No. 02-1127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, on behalf of itself, its members and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., on behalf of itself and its members,
Defendant-Appellant.

Argued: March 14, 2006.

Decided and Filed: August 16, 2006.

Rehearing and Rehearing En Banc Denied: December 7, 2006.

Before: KENNEDY, COLE and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

Communities for Equity (CFE), a group comprised of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity in athletics, brought a class action lawsuit against the Michigan High School Athletic Association (MHSAA), arguing that MHSAA's scheduling of sports seasons discriminates against female athletes on the basis of gender. The district court concluded

that MHSAA's actions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Civil Rights Act of 1964, and Michigan's Elliott-Larsen Civil Rights Act. In 2004, this court affirmed the judgment of the district court on the ground that MHSAA's actions violate the Equal Protection Clause. *Cmtys. for Equity v. Mich. High School Athletic Ass'n (CFE I)*, 377 F.3d 504 (6th Cir. 2004). The *CFE I* court did not reach the Title IX or state-law issues.

Following a petition for certiorari filed by MHSAA, the United States Supreme Court vacated the *CFE I* decision and remanded the case for further consideration. The order, commonly referred to as a grant/vacate/remand order (GVR), directed this court to reconsider the case in light of *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005), a case decided in the Court's last term. After reconsideration, and for the reasons set forth below, we again **AFFIRM** the judgment of the district court.

I. BACKGROUND

The background of this case is thoroughly discussed in the findings of fact of the district court, *Communities for Equity v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805, 807-846 (W.D. Mich. 2001), and in *CFE I*, 377 F.3d at 506-10. CFE's basic complaint is that MHSAA discriminates against female high-school athletes by scheduling girls' sports to play in disadvantageous, nontraditional seasons. Our task is now to reevaluate this claim in light of the Supreme Court's GVR, which provides in relevant part as follows: "Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of our opinion in *Rancho Palos Verdes v. Abrams*." *Mich. High School Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012, 125 S. Ct. 1973, 161 L. Ed. 2d 845 (2005).

On remand, MHSAA argues that, based on the Supreme Court's decision in *Ranchos Palos Verdes*, Title IX provides the exclusive remedy for the alleged violations that bars CFE from seeking additional remedies under 42 U.S.C. § 1983. CFE responds by contending that *Rancho Palos Verdes* does not apply to the present case and that CFE is therefore entitled to prevail under both Title IX *and* § 1983.

II. ANALYSIS

A. Standard of review

Constitutional and statutory interpretation questions are issues of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004). In contrast, we apply the "clearly erroneous" standard of review to the factual findings of the district court. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir. 2003).

B. The Effect of *Rancho Palos Verdes*

1. Implications of the GVR

MHSAA relies on the following description of the GVR procedure to argue that the result in *CFE I* must be altered:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996) (holding that a GVR is "an appropriate exercise of [the Supreme Court's] discretionary certiorari jurisdiction"). Subsequent interpretations of that language,

however, make clear that a GVR does not indicate, nor even suggest, that the lower court's decision was erroneous.

In *Stutson v. United States*, 516 U.S. 193, 197-98, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996), for example, the Court issued a GVR directing the Eleventh Circuit to reconsider that case in light of the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). Focusing on the fact that the Eleventh Circuit did not fully consider whether *Pioneer* applied, and classifying *Pioneer* as a "*potentially* relevant decision*[]*, "516 U.S. at 197 (emphasis added), the *Stutson* Court acknowledged that the Eleventh Circuit may "conclude that *Pioneer* does not apply" and thus reach the same result on remand. *Id.* at 196, 116 S. Ct. 600.

Other courts have also opined that a GVR does not necessarily indicate that the Supreme Court desires a different result. In *Gonzalez v. Justices of the Municipal Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005), for example, the First Circuit pondered the implication of a GVR that instructed the court to reconsider an earlier holding in light of a recent Supreme Court decision. After discussing the above-quoted language from *Lawrence*, the *Gonzales* court opined:

> It is important to remember, however, that a GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it. . . . Consequently, we do not treat the Court's GVR order as a thinly-veiled direction to alter our course; rather, the order recognizes—as do we—that the *Smith* decision is pertinent and requires us

> to determine whether anything that the *Smith* Court said demands a different result.

Id. at 7-8; *see also United States v. Norman*, 427 F.3d 537, 538 n.1 (8th Cir. 2005) ("The GVR is not the equivalent of a reversal on the merits, however. Rather, the Court remands for the sake of judicial economy—so that the lower court can more fully consider the issue with the wisdom of the intervening development."). The GVR therefore requires us to consider the effect of *Rancho Palos Verdes* on the present case, but it does not suggest that the Supreme Court believes that *CFE I* was wrongly decided.

2. Summary of the Sea Clammers/Rancho Palos Verdes doctrine

In order to analyze the issue highlighted by the GVR, a brief summary of § 1983 and the line of cases on which *Rancho Palos Verdes* relied is essential. The key language of 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

For plaintiffs, then, § 1983 serves as a vehicle to obtain damages for violations of both the Constitution and of federal statutes.

Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), is the seminal case discussing the intersection between statutory remedies and § 1983 , and it provides the basis for the Supreme Court's later decision in *Rancho*

Palos Verdes. In *Sea Clammers*, the plaintiffs were fishermen who worked off the coast of New York and New Jersey. They brought suit under the Federal Water Pollution Control Act (the FWPCA), 33 U.S.C. § 1251, the Marine Protection, Research, and Sanctuaries Act of 1972 (the MPRSA), 33 U.S.C. § 1401, and § 1983, alleging a violation of the preceding statutes as a result of damage to fishing grounds caused by polluters dumping sewage and other waste in the ocean. *Sea Clammers*, 453 U.S. at 4-5, 101 S. Ct. 2615.

The substantive statutes at issue in *Sea Clammers*—the FWPCA and the MPRSA—authorize the Administrator of the Environmental Protection Agency (EPA) to seek civil and criminal penalties for violations of the acts, and permitted "any interested person[]" to seek judicial review of the Administrator's actions regarding the issuance of pollutant discharge permits and the establishment of pollution standards. *Id.* at 13-14, 101 S. Ct. 2615. Both statutes contain an express citizen-suit provision, but those provisions authorize private parties to sue only for injunctive relief rather than the monetary relief the plaintiffs in *Sea Clammers* were seeking. *Id.*

The *Sea Clammers* Court focused on Congress's intent, and held that the plaintiffs could not use § 1983 as a vehicle to enforce federal statutory laws where the acts themselves contained "unusually elaborate enforcement provisions." *Id.* at 13, 101 S. Ct. 2615. Because Congress enacted "so many specific statutory remedies, including the two citizen-suit provisions" in the FWPCA and the MPRSA, the Court found it "hard to believe that Congress intended to preserve the § 1983 right of action." *Id.* at 20, 101 S. Ct. 2615. Instead, the *Sea Clammers* Court emphasized that the nature and extent of the remedies available in the water-pollution statutes clearly indicated that Congress had considered the methods of redress for violations of the statutes and intended the remedies provided in the statutes to be complete. *Id.* As a result, the Court held that when claiming

a violation of the FWPCA and the MPRSA, the remedies authorized in those acts preclude resort to § 1983.

The Court interpreted the *Sea Clammers* doctrine a few years later in *Smith v. Robinson,* 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). In *Smith,* the plaintiffs were the parents of a handicapped child who was allegedly being denied a "free appropriate public education." They brought suit against the school district for relief under the Education of the Handicapped Act (the EHA), 20 U.S.C. § 1400, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, pursuant to § 1983. Unlike *Sea Clammers,* which concerned an effort to enlarge a statutory remedy by asserting a claim based on the "and laws" provision of § 1983 , the *Smith* case questioned the ability of plaintiffs to use § 1983 as a vehicle to enforce a constitutional remedy *in addition to* the remedies available under the EHA. *Id.* at 1005, 104 S. Ct. 3457. Because the Court concluded that the constitutional claims were "virtually identical to their EHA claims," it framed the issue as whether "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert those claims." *Id.* at 1009, 104 S. Ct. 3457.

The Court then engaged in a thorough analysis of the EHA's provisions and legislative history in order to answer this question. *Id.* at 1009-12, 104 S. Ct. 3457. After discussing the "carefully tailored administrative and judicial mechanism set out in the [EHA]," the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state education agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection

> claim to a free appropriate public education. . . . [W]e think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme.

Id. at 1011-12, 104 S. Ct. 3457. In other words, Congress intended for the EHA to serve as the exclusive method by which plaintiffs could assert the right to a free appropriate public education, and resort to § 1983 is prohibited. *Id.* at 1013, 104 S. Ct. 3457. Such an intent, according to the Court, was found in the comprehensive procedures and guarantees established in the EHA. *Id.*

Finally, the Court decided *Rancho Palos Verdes* in 2005 and remanded the present case in light of that decision. In *Rancho Palos Verdes*, plaintiff Abrams brought suit against the Rancho Palos Verdes municipal government after he was denied a permit to build a radio tower on his property. 125 S. Ct. at 1457. Abrams sought injunctive relief under the Telecommunications Act (the TCA), 47 U.S.C. § 332(c)(7), and damages and attorney's fees under § 1983—essentially using both statutes to enforce the violation of rights created by the TCA. *Id.* Like the statutes at issue in *Sea Clammers* and *Smith*, the TCA itself does not expressly provide for monetary relief. *Id.* at 1459. Instead, the TCA permits private parties to seek redress through administrative channels and through injunctive relief in the courts. *Id.*; *see also* 47 U.S.C. § 332(c)(7). The Court, as it had done in *Sea Clammers*, 435 U.S. at 20, 101 S. Ct. 2615, framed the issue as whether Congress intended the judicial remedy expressly authorized in the TCA to coexist with the alternative remedy authorized in § 1983. *Rancho Palos Verdes*, 125 S. Ct. at 1458.

Although the TCA expressly provides a private judicial remedy, the Court explicitly rejected the notion that the availability of a private remedy under the substantive statute necessarily forecloses an action under § 1983. *Id.* at 1459; *see also ASW v. Oregon*, 424 F.3d 970, 977-78 (9th Cir.

2005) (characterizing the holding of *Rancho Palos Verdes* as one focused on the comprehensiveness of the remedy). The Court instead looked to the extent of the remedy authorized by the TCA, reasoning that "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not." *Rancho Palos Verdes*, 125 S. Ct. at 1458-59 (noting that both *Sea Clammers* and *Smith* "rested upon the existence of more restrictive remedies provided in the violated statute itself"). After engaging in a careful analysis of the legislative history of the TCA and the remedies it expressly provided, *id.* at 1459-62, the Court concluded that Congress must have intended the TCA remedies to be the exclusive relief available to a plaintiff complaining of a TCA violation. *Id.* at 1462.

Sea Clammers and the other cases on which the Supreme Court relied operate under the assumption that limitations placed by Congress upon statutory remedies are not to be evaded through § 1983. *See ASW*, 424 F.3d at 978 (noting that the *Rancho Palos Verdes* Court wanted to prevent § 1983 from serving as an "end run around the enforcement mechanism Congress provided"). The TCA, like the statutes at issue in *Sea Clammers* and *Smith*, contains express private remedies for violations of rights granted in those statutes. *See Rancho Palos Verdes*, 125 S. Ct. at 1458-59, 1462. Because the administrative and judicial remedies authorized in the TCA are detailed, yet more restrictive than the remedies available under § 1983, the Court reasoned that it would contravene Congress's intent to allow Abrams to recover under both statutes where Congress had provided in the TCA precisely the remedies it considered appropriate. *Id.* at 1462.

3. Application of the Sea Clammers/Rancho Palos Verdes doctrine to Title IX

As a result of the decision in *Rancho Palos Verdes* and the GVR, MHSAA argues that Title IX precludes CFE's claims under § 1983. CFE, however, contends that the *Sea Clammers* line of cases does not control the result here, and urges us to reach the merits of both the Title IX claim *and* the constitutional claims brought pursuant to § 1983. For the reasons set forth below, we agree with CFE that Title IX does not preclude recovery under § 1983.

Both *Sea Clammers* and *Rancho Palos Verdes* dealt with plaintiffs who attempted to enforce federal statutory rights through the "and laws" language of § 1983. The *Sea Clammers* plaintiffs based their action on several federal statutes, but sought recovery pursuant to § 1983 because of the additional remedies available through that statute that were not available under the substantive water-pollution statutes. Similarly, the plaintiff in *Rancho Palos Verdes* sought money damages and attorney's fees pursuant to § 1983 because the TCA failed to authorize that type of recovery. In both *Sea Clammers* and in *Rancho Palos Verdes*, furthermore, the rights that plaintiffs were asserting were based solely on federal statutory law—in other words, rights created by Congress. Even though the statutes that created the very rights that they were asserting did not authorize monetary damages, the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes* sought such damages pursuant to § 1983.

This litigation strategy was explicitly disapproved of by the Supreme Court in both cases and forms the bedrock for the *Sea Clammers* principle. The key inquiry is whether Congress intended the remedies in the substantive statute to be exclusive. *See Sea Clammers*, 453 U.S. at 14, 101 S. Ct. 2615 ("In view of these elaborate enforcement provisions, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the water-pollution statutes].)" To allow the plaintiffs in such cases to benefit from the additional remedies available pursuant to § 1983 would create an end-

run around the substantive statutory remedies and contravene Congress's intent. *See, e.g., Smith,* 468 U.S. at 1012, 104 S. Ct. 3457 (relying on the *Sea Clammers* doctrine to hold that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme"). The Court recently reaffirmed its concern in *Rancho Palos Verdes* when it held that "enforcement [of the TCA] through § 1983 would distort the scheme of . . . limited remedies created by [the TCA]." 125 S. Ct. at 1462.

Unlike the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes*, CFE invoked § 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment. This is a critical distinction. The Court's analysis both in *Sea Clammers* and *Rancho Palos Verdes* hinges on the fact that when Congress created the particular rights through statute, it also created particular remedies for those statutory violations. See *Rancho Palos Verdes*, 125 S. Ct. at 1458 ("Thus, the existence of a more restrictive private remedy has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not."); *see also Sea Clammers*, 453 U.S. at 20, 101 S. Ct. 2615 ("When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.").

In the present case, however, CFE asserts violations of Title IX *and* of the Fourteenth Amendment, meaning that CFE's allegations would be actionable even if Congress had never enacted Title IX. The question of what Congress intended, then, concerns not only which remedies Congress sought to provide for Title IX violations, but whether Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972.

Because *Sea Clammers* and *Rancho Palos Verdes* concerned plaintiffs who attempted to recover only for violations of federal statutory law (as opposed to constitutional law) through the enforcement mechanism of § 1983, those cases are distinguishable from the present case. Although not on all fours, the *Smith* case provides the closest fit to the situation here because the § 1983 claims in *Smith* were based on Fourteenth Amendment violations rather than the violations of "other laws." 468 U.S. at 1005, 104 S. Ct. 3457. The *Smith* Court held that where the constitutional claims pursuant to § 1983 were "virtually identical" to the statutory claims, the § 1983 claims were precluded because "Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Id.* at 1009, 104 S. Ct. 3457.

Applying *Smith* to the case before us, the necessary factors to consider in order to determine if Title IX precludes resort to § 1983 are (1) whether CFE's Title IX claims are "virtually identical" to its constitutional claims, and (2) whether the remedies provided in Title IX indicate that Congress intended to preclude reliance on § 1983. *Id.* Recovery under § 1983 is precluded by *Smith* only if both factors are satisfied. *See Smith*, 468 U.S. at 1009, 104 S. Ct. 3457.

A comprehensive discussion of both factors is not necessary so long as one factor is clearly not satisfied, which is the case here. *See Lillard v. Shelby County Board of Education*, 76 F.3d 716, 723 (6th Cir. 1996) (declining to engage in a protracted discussion of the first factor because the second one was not satisfied). So even if we were to hold that CFE's Title IX claims are "virtually identical" to its claims brought pursuant to § 1983, we would still have to consider whether Congress intended for Title IX to supplant CFE's constitutional claim pursuant to § 1983. *See Smith*, 468 U.S. at 1009, 104 S. Ct. 3457 (determining that

the claims were virtually identical and then considering "whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims.").

Our dissenting colleague correctly notes that the *Smith* inquiry contains two prongs: (1) whether the constitutional claim pursuant to § 1983 is virtually identical to the claim under Title IX, and (2) whether Title IX provides a remedy comprehensive enough to be exclusive. After articulating the inquiry, however, the dissent appears to conflate the two prongs by stating that once a court determines that the constitutional claim pursuant to § 1983 is virtually identical to the statutory claim, we have reason to "assume that Congress intended to preclude use of § 1983 to enforce those claims." Dissenting Op. at 23. This purported presumption finds no support in the caselaw, and we respectfully disagree that such a presumption exists. We instead believe that the two prongs set forth in *Smith* are intended to be independently evaluated. Neither the Supreme Court nor any of our sister circuits has suggested that the second prong is a more difficult obstacle for a plaintiff to overcome once the first prong is satisfied.

This court in *Lillard* has already addressed the second prong of the *Smith* inquiry—whether Title IX provides a remedy comprehensive enough to be exclusive. *Id.* Several plaintiffs in *Lillard* sought relief under both Title IX and under the First and Fourteenth Amendments (as remedied through § 1983). The *Lillard* court was faced with the issue of "whether Title IX's statutory remedy precludes the plaintiffs from bringing a substantive due process claim under section 1983," *id.* at 718, and it began its analysis by distinguishing *Sea Clammers*:

> [W]hile in *National Sea Clammers*, allowing the section 1983 action to enforce the rights at issue would have effectively circumvented the implicit congressional intention to foreclose the private rights of action, here, the plaintiffs' section 1983 action does not attempt either to circumvent Title

> IX procedures, or to gain remedies not available under Title IX. . . . Plainly, *National Sea Clammers* does not, on its face, stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim, thus prohibiting a section 1983 action grounded in substantive due process. Instead, that case speaks only to whether federal statutory rights can be enforced both through the statute itself *and* through section 1983.

Id. at 723.

After distinguishing *Sea Clammers*, the *Lillard* court went on to characterize *Smith* as standing for the proposition that Congress can create a statutory vehicle as an alternative to enforcing constitutional rights pursuant to § 1983. *Id.* As highlighted by the second factor of the *Smith* inquiry, however, Congress's intent to do so must be clear. *Id.*

The *Lillard* court concluded that, in contrast to the statutes at issue in *Sea Clammers* and *Smith*, Title IX contains no comprehensive enforcement scheme indicating that Congress intended to preclude recovery under § 1983. *Id.* Although the Supreme Court found an implied private right of action for Title IX violations in *Cannon v. University of Chicago*, 441 U.S. 677, 683, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds. *Lillard*, 76 F.3d at 723. This stands in stark contrast to the water-pollution statutes at issue in *Sea Clammers* and the EHA at issue in *Smith*. Those statutes expressly provided "carefully tailored" administrative and judicial remedies clearly indicating that Congress intended plaintiffs seeking redress to use the substantive statute rather than the additional remedies available under § 1983. *Sea Clammers*, 453 U.S. at 20, 101 S. Ct. 2615; *Smith*, 468 U.S. at

1009, 104 S. Ct. 3457. A review of the provisions and legislative history of Title IX, however, led this court to the following conclusion:

> One can only conclude, therefore, that *National Sea Clammers* does not speak to Title IX, since there is no evidence in Title IX that 'Congress intended to foreclose [a § 1983] action by providing an exclusive remedy within' Title IX. Thus, even if the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights, rather than their constitutional rights, through section 1983, *National Sea Clammers* would have provided no support.

Lillard, 76 F.3d at 723 (citation omitted).

Whereas the Supreme Court in *Sea Clammers* and *Smith* was able to highlight specific statutory remedies as evidence of Congress's intent for the substantive statutes to provide the exclusive means of relief, the *Lillard* court found no similar examples of congressional intent in Title IX. Title IX, after all, contains *no* express private remedy at all. *Id.; see also Rancho Palos Verdes*, 125 S. Ct. at 1459 (citing *Sea Clammers* and *Smith*, and explaining that the existence of a private judicial remedy is an important factor to consider when attempting to discern congressional intent). *Lillard*, then, concluded that the remedies afforded in Title IX are insufficient to preclude the pursuit of a remedy under § 1983.

4. The precedential value and vitality of Lillard

Our dissenting colleague argues that we are not bound by *Lillard* because its discussion regarding the extent of the Title IX remedy was dicta. *See* Dissenting Op. at 23. We respectfully disagree. Rather than focusing on the first *Smith* factor--whether the constitutional and statutory claims are virtually identical—the *Lillard* court held that *"neither [Smith] factor appears here."* 76 F.3d 716, 723 (6th Cir. 1996) (emphasis added). We therefore do not see the

holding as one focused on the first *Smith* factor, nor the discussion of the second *Smith* factor as dicta. In fact, the *Lillard* court engaged in no substantive analysis of the first *Smith* factor at all, instead dedicating the entirety of the *Smith* analysis to a discussion of the second factor-whether Title IX provides a remedy comprehensive enough to be exclusive.

The dissent's emphasis on one line of *Lillard* to the effect that *Sea Clammers* would not have required preemption "even if the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights," Dissenting Op. at 23, does not persuade us that *Lillard*'s conclusion as to the extent of the Title IX remedy was dicta. In *Lillard*, the court articulated two "important distinctions" that rendered the *Sea Clammers* analysis inapposite: (1) the plaintiffs in *Lillard* were seeking to enforce constitutional rights rather than statutory rights, and (2) Title IX, unlike the statutes at issue in *Sea Clammers*, did not provide a comprehensive and exclusive remedy. 76 F.3d at 722-23. The "even if" language on which our colleague seizes, then, proves nothing more than that the court had two grounds for concluding that the plaintiffs could seek remedies under both Title IX and § 1983, and that the outcome would have remained the same despite the nature of the underlying claim.

We also acknowledge our dissenting colleague's argument that *Lillard* should not control our decision in the present case because *Lillard* dealt with a substantive due process claim pursuant to § 1983 rather than an equal protection claim. *See* Dissenting Op. at 21-25. Contrary to our dissenting colleague's view, however, we see no consequence to this distinction. As discussed above, regardless of whether CFE's equal protection claim is "virtually identical" to its Title IX claim, we still must consider whether Title IX provides the exclusive and comprehensive remedy for MHSAA's alleged violations. *Lillard* answered this latter inquiry in the negative, and we

remain bound by its holding despite the dissent's suggestion that "[w]hen ascertaining Congress' intent, . . . we have to do so with the precise rights in mind." Dissenting Op. at 22.

Although the *Lillard* court noted that the plaintiffs were seeking to enforce substantive due process rights that were "wholly independent" and "totally distinct" from the rights granted in Title IX, its discussion of the extent of the remedies contained in Title IX focused on the provisions of Title IX generally, not on whether Title IX's enforcement scheme was comprehensive with regard to the substantive due process claim. We have found no decision, either by the Supreme Court or our sister circuits, holding that Congress intended Title IX to be the exclusive remedy for one claim but not another, and we fail to understand how this could possibly be the case considering that Congress provided no express remedies at all in the statute.

The dissent also relies on *Smith*, 468 U.S. at 1013-1014, 104 S. Ct. 3457, as support for the proposition that "for each constitutional claim, a court must engage in a separate analysis of whether that claim, provided for by a statutory remedy, is precluded from being brought under § 1983. . . ." Dissenting Op. at 22. Although we acknowledge that the *Smith* Court did in fact contemplate two separate analyses—one concerning the equal protection claim and one concerning the substantive due process claim—the statute at issue in *Smith* provided *express* remedies that the Court concluded were carefully tailored so as to preempt recovery for an equal protection violation under § 1983. The *Smith* Court's apparent willingness (we say willingness because the Court did not ultimately reach this issue) to conduct a similar analysis as it pertained to substantive due process is not surprising given the clear textual indication of Congress's intent in the EHA to preempt reliance on § 1983 by affording a comprehensive remedy for equal protection claims, whereas the statutory language may not provide an adequate remedy for other constitutional claims brought pursuant to § 1983.

Lillard's analysis, however, was based on the fact that "Title IX contains no comprehensive enforcement scheme." 76 F.3d at 723. The Lillard court did not suggest that the dearth of enforcement provisions in Title IX was relevant to substantive due process claims only, as opposed to equal protection claims or other claims brought pursuant to § 1983. In fact, language in the opinion indicates that the court considered the lack of remedies in Title IX as it pertained to *all* § 1983 claims. *Id.* ("[T]here is no evidence in Title IX that Congress intended to foreclose a section 1983 action by providing an exclusive remedy within Title IX.") (citation and quotation marks omitted).

Two of our sister circuits, moreover, have relied on *Lillard* to hold that Title IX is not comprehensive enough to be exclusive even though the plaintiffs in those cases sought relief under § 1983 for equal protection violations rather than substantive due process violations. *See Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (distinguishing *Sea Clammers* and finding "unpersuasive the [] argument that Title IX contains a sufficiently comprehensive remedial scheme") (quotation marks omitted); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) ("We agree with the Sixth Circuit [in *Lillard*], and conclude that [the plaintiff's] § 1983 action [to enforce independent constitutional rights] is not barred by Title IX."). The analysis employed by the Eighth and Tenth Circuits in those cases did not differ from the analysis of *Lillard* even though those courts were, like in the present case, considering the preemption of equal protection claims pursuant to § 1983. In sum, the question of whether Title IX is comprehensive enough to be exclusive is an inquiry that does not change regardless of the constitutional claim at issue.

The bottom-line argument of both our dissenting colleague and MHSAA is that we should not follow *Lillard*. MHSAA contends that the GVR commands us to reconsider, and thus overturn, that decision. The dissent likewise articulates its disagreement with the reasoning of

Lillard, arguing that the second prong of the *Smith* inquiry must include consideration of not only the express remedies in Title IX, but also the remedies implied by the Supreme Court. We will address these arguments in turn.

MHSAA argues that "the clear implication of the Supreme Court's remand order is that it would like this Court to reconsider *Lillard*." The Supreme Court, of course, did not mention *Lillard* in the GVR. Nor did the Court address Title IX in either the GVR or in *Rancho Palos Verdes*, the case on which the GVR is based. Although MHSAA argues that *Rancho Palos Verdes* demands that we revisit *Lillard*, it fails to support its contention with any reasoned analysis. Instead, MHSAA simply recites the holding of *Sea Clammers*, acknowledges this court's holding in *Lillard*, and concludes that because *Rancho Palos Verdes* falls within the *Sea Clammers* line of cases, *Lillard* must be revisited.

MHSAA's own characterization of the *Sea Clammers* holding—"that specific statutory remedies displace the general private right of action under 42 U.S.C. § 1983 *when they are comprehensive enough to be exclusive*"—demonstrates why *Lillard* is still good law. The *Lillard* court acknowledged the *Sea Clammers* doctrine and held that it did not apply to Title IX because Title IX was not comprehensive enough to be exclusive. In other words, the *Lillard* court found that the dearth of remedies authorized in Title IX, either private or public, indicated that Congress did not intend to preclude recovery under § 1983 when it enacted Title IX. *See Lillard*, 76 F.3d at 723.

Rancho Palos Verdes did not alter the premise on which *Sea Clammers* was based and thus did not alter the vitality of *Lillard*. In *Rancho Palos Verdes*, as in the *Sea Clammers* and *Smith* cases, the primary question was whether Congress intended to foreclose reliance on § 1983. The Court in each of these cases focused on the extent of the rights and remedies provided in the statutory scheme. In those cases, the statutes at issue provided detailed means by

which the private parties could seek redress, either through judicial or administrative channels. And in each of those cases, Congress neglected to explicitly authorize the types of remedies available under § 1983. The lodestar, in all cases, is what Congress intended. This court in *Lillard* addressed that precise inquiry as it related to Title IX and held that Congress did not intend to preclude recovery under § 1983. 76 F.3d at 723. "[U]nless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision," *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985), we remain bound by *Lillard*.

We see nothing in *Rancho Palos Verdes* that requires modification of *Lillard* or its reasoning, even though, as MHSAA notes, three other circuits have held that Congress intended Title IX to be exclusive. *See Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756-59 (2d Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862-63 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Unlike this court in *Lillard*, the Second, Third, and Seventh Circuits declined to distinguish *Sea Clammers* on the basis that the Title IX cases concerned application of § 1983 to enforce independent constitutional rights rather than federal statutory law. *See, e.g., Bruneau*, 163 F.3d at 757 ("We see nothing in *Sea Clammers* that would support a constitutional rights exception."). Those circuits also held that because the Supreme Court concluded that Title IX contains an implied damages remedy, *see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), Title IX "gives plaintiffs access to the full panoply of judicial remedies." *See Waid*, 91 F.3d at 862-63 (holding that such access indicates Congress's intent to preclude reliance on § 1983).

On the other hand, MHSAA fails to recognize the cases from the Eighth and Tenth Circuits that have agreed with

this court's holding in *Lillard*. *See Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1234. The fact that the courts of appeal are evenly split on the issue of whether Congress intended Title IX to provide a complete remedy bolsters the conclusion that the GVR in the present case did not imply that this court should reconsider *Lillard*. Even if the Supreme Court thought *Lillard* was wrongly decided and attempted to cure the defect through a GVR in the present case, the decisions of the Eighth and Tenth Circuits would be unaffected—meaning that the circuit split would continue.

Because we have determined that *Lillard* is controlling precedent, we need not extol its virtues in order to reach a decision in the present case. We nevertheless defend *Lillard*'s approach in response to the great weight that our dissenting colleague gives to *Cannon v. University of Chicago*, 441 U.S. 677, 689, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), in which the Supreme Court held that a private remedy was implicit in Title IX. Dissenting Op. at 24. The dissent also relies on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), in which the Supreme Court relied on Congress's silence subsequent to the *Cannon* decision to hold that Congress "did not intend to limit the remedies available in a suit brought under Title IX." *Id.*; *Franklin*, 530 U.S. at 73, 120 S. Ct. 2054. Although *Cannon* and *Franklin* relied on implicit evidence of congressional intent rather than the explicit text of Title IX, the dissent reasons that "[t]he [implied] intent found by the Supreme Court. . . should be given the same weight as expressed intent[]"—essentially arguing that the private damages remedy that the Supreme Court read into Title IX satisfies *Smith*. Dissenting Op. at 24. We respectfully disagree.

Although the Supreme Court read an implied remedy into Title IX in *Cannon*, 441 U.S. at 689, 99 S. Ct. 1946, this implied remedy does not satisfy the second prong of the *Smith* inquiry. The Supreme Court has made clear that the

question of what Congress intended is an inquiry focused on the statute itself. In *Smith*, for example, the Court referred to the "carefully tailored administrative and judicial mechanism *set out in the statute*." 468 U.S. at 1009, 104 S. Ct. 3457 (emphasis added). The *Rancho Palos Verdes* Court also focused on the explicit text of the statute:

> Our cases have explained that evidence of such congressional intent may be found *directly in the statute creating the right*, or inferred from the *statute's creation* of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. . . . The provision of an *express*, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."

544 U.S. at 120-21, 125 S. Ct. 1453 (emphasis added). Although the Court later in its decision discusses the "availability of a private judicial remedy"—language that the dissenting opinion adopts—without making the distinction between explicit and implied remedies, the statute at issue in *Rancho Palos Verdes* (as well as in *Sea Clammers* and *Smith* contains an explicit private remedy. We therefore read *Rancho Palos Verdes* as extending only to statutes that contain an explicit private remedy that is sufficiently comprehensive for us to infer that Congress intended the remedy to be exclusive.

Title IX does not satisfy this standard. The fact that the Supreme Court implied a private remedy in *Cannon* gives strength to the argument that Congress did not intend for the termination of federal funds—the only remedy explicitly authorized by Title IX—to serve as a comprehensive or exclusive remedy. *See* Michael A. Zwiebelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1481-82 (1998). Rather, the Supreme Court held that an implied private right of action—in addition to the explicit

remedy of termination of federal funds—was necessary to achieve the fundamental purpose of Title IX. *Cannon*, 441 U.S. at 709, 99 S. Ct. 1946. Whether Congress intended to create or foreclose a private remedy, as was at issue in *Cannon*, is decidedly different from the second prong of *Smith*, which asks whether Congress intended to create an enforcement scheme so comprehensive that it could serve as the *exclusive* avenue for relief, thus precluding claims under § 1983.

The Supreme Court's decision in *Franklin*, 503 U.S. at 66, 112 S. Ct. 1028, does not undermine our analysis. *Franklin's* conclusion was guided by the traditional presumption that all appropriate remedies may be implied in a statute unless Congress has explicitly indicated otherwise. *See id.* In other words, the Court relied on Congress's *silence* in implying the damages remedy in *Franklin*. *Id.* Congressional silence, though sufficient to find an implied remedy, cannot be equated with the carefully tailored remedies present in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*.

Justice Stevens's concurrence in *Rancho Palos Verdes* supports our determination that the *Smith* inquiry is distinct from the question of whether the Supreme Court may imply a private judicial remedy:

> Sometimes the question is whether, despite its silence, Congress intended us to recognize an implied cause of action. [citing *Cannon*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560]. Sometimes we ask whether, despite its silence, Congress intended us to enforce the pre-existing remedy provided in [42 U.S.C. § 1983]. *And still other times*, despite Congress' inclusion of specific clauses designed specifically to preserve pre-existing remedies, we have nevertheless concluded that Congress impliedly foreclosed the § 1983 remedy. [citing *Sea Clammers*, 453 U.S. at 13, 101 S. Ct. 2615].

Rancho Palos Verdes, 544 U.S. at 129 (Stevens, J., concurring in the judgment) (emphasis added). The *Smith* inquiry, as highlighted by Justice Stevens, is not an offshoot of the inquiry performed in *Cannon*. *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) ("[W]hether a statutory violation may be enforced through § 1983 is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.").

In short, we cannot agree with our dissenting colleague that Title IX precludes relief under § 1983 simply because the Supreme Court has implied a private right of action. The Supreme Court has never held that an implied judicial remedy is enough to preclude relief under § 1983, and the caselaw does not support such a conclusion in the present case. The rationale on which *Lillard* was based, therefore, remains persuasive. Because we conclude that *Lillard* remains good law and is unaffected by *Rancho Palos Verdes*, CFE may seek remedies under § 1983 as well as under Title IX.

C. Equal Protection Clause

1. State action

The Fourteenth Amendment to the United States Constitution provides that"[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a "state actor." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir. 1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.") (citation and quotation marks omitted).

As a threshold issue, therefore, we must determine whether MHSAA is a state actor.

In determining that MHSAA was a state actor, the district court relied upon the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 846-848 (W.D. Mich. 2001). The *Brentwood* Court addressed the issue of whether the Tennessee Secondary School Athletic Association (TSSAA), which was "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school. *Brentwood Academy*, 531 U.S. at 290. Because of "the pervasive entwinement of state school officials in the structure of the association," the Court held that the TSSAA's regulatory activity constituted state action. *Id.* at 291, 121 S. Ct. 924. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry," and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295, 298, 121 S. Ct. 924 (citation and quotation marks omitted).

Public schools constituted 84% of TSSAA's membership, the Court noted, and public school faculty and administrators provided TSSAA's leadership. *Id.* at 298, 121 S. Ct. 924. The Court was further influenced by the fact that TSSAA's primary revenue source was gate receipts from tournaments between TSSAA member schools. *Id.* at 299, 121 S. Ct. 924. In conclusion, the Court stated that,

> to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of

> secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299-300, 121 S. Ct. 924. The Court also found significant that TSSAA ministerial employees were treated like state employees by virtue of their eligibility for membership in the state retirement system. *Id.* at 300, 121 S. Ct. 924.

MHSAA, like TSSAA, is comprised primarily of public schools, and MHSAA's leadership is dominated by public school teachers, administrators, and officials. Students at MHSAA-member schools, like Tennessee students, may satisfy physical education requirements for high school by participating in MHSAA-sanctioned interscholastic sports. Because MHSAA, like TSSAA, is so entwined with the public schools and the state of Michigan, and because there is "such a close nexus between the State and the challenged action," MHSAA is a state actor. Tellingly, MHSAA argued earlier in this litigation, before the Supreme Court reversed the Sixth Circuit's opinion in *Brentwood Academy*, that "the nature and function of the MHSAA is virtually identical to that of the TSSAA." *Cmtys. for Equity*, 178 F. Supp. 2d at 847. MHSAA, in sum, has failed to present any compelling argument to distinguish itself from TSSAA. We therefore uphold the determination of the district court that MHSAA is a state actor.

2. Denial of equal protection

The Supreme Court has held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action." *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (dealing with the admission of women to the Virginia Military Institute, hereafter referred

to as *V.M.I.*). In *V.M.I.*, the Court further explained the state's burden under the heightened standard for gender-based classifications:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33, 116 S. Ct. 2264 (citation and quotation marks omitted).

The district court analyzed the scheduling of the Michigan athletic seasons under *V.M.I.*'s standard, determining that MHSAA had to show that scheduling team sports in different seasons based on gender "serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." *Cmtys. for Equity*, 178 F. Supp. 2d at 850. In addition, the district court noted that MHSAA's justifications must be "exceedingly persuasive." *Id.* MHSAA asserted that the scheduling decisions sought to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and

coaches, thereby permitting more teams in a sport or more spots on a team." *Id.*

Conceding that MHSAA's logistical concerns were important, the district court concluded that MHSAA had failed to demonstrate, pursuant to the standards set forth in *V.M.I.*, that discriminatory scheduling was "'substantially related' to the achievement of those asserted objectives." *Id.* at 850-51. MHSAA's reliance upon anecdotal and "weak circumstantial" evidence was found insufficient to carry MSHAA's burden. The district court also pointed out that *even if* MHSAA had sufficiently proven their point about athletic participation opportunities, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." *Id.* at 851.

On appeal, MHSAA reiterates its argument made below that the purpose of separate athletic seasons for boys and girls is to maximize opportunities for athletic participation. MHSAA asserts that statistics showing that Michigan has a higher number of female participants in high school athletics than most states satisfies the requirements of *V.M.I.* It also argues that the "unavoidable consequence of separate teams was accommodation of twice the number of teams, games and participants." Although we acknowledge that schools in Michigan may have limited facilities, MHSAA's claim that the inadequate facilities require the female athletes to always play in the disadvantageous seasons is without merit. MHSAA could, after all, rearrange the schedules and require some of the male sports to play in disadvantageous seasons without increasing the overall use of the facilities.

The evidence offered by MHSAA, moreover, does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. MHSAA simply states that bare participation statistics "are the link showing that separate seasons are substantially related to maximum participation." But a large gross-participation number alone

does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

MHSAA also argues that it cannot be liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent. It points out that "[t]here is no evidence that MHSAA [] scheduled [] sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." This argument appears to confuse intentional discrimination—i.e., an intent to treat two groups differently—with an intent to harm. As stated above, equal protection analysis requires MHSAA to show that its disparate treatment of male and female athletes "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *V.M.I.*, 518 U.S. at 532-33, 116 S. Ct. 2264. MHSAA's justifications for its actions must also be "exceedingly persuasive." *Id.*

Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *V.M.I.* imposes no requirement upon CFE to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls. The cases that MHSAA cites to the contrary, such as *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), are inapposite because they involve facially *neutral* classifications, rather than facially *gender-based* classifications. In *Hernandez*, for example, the Court analyzed a racially neutral explanation for a prosecutor's exercise of peremptory strikes, noting that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 111 S. Ct. 1859. The facts of the present case are quite different from those of *Hernandez*, and proof of a discriminatory motive is not necessary.

MHSAA asserts, however, that the "only facial classification at work in this case was the original decision to

have separate high school sports teams for boys and girls." Once the legality of separate programs has been conceded, MHSAA argues, issues regarding the implementation of those programs do not classify the players by gender. Conceding that separating boys and girls sports *is* a facial classification, MHSAA claims that other issues (scheduling, uniforms, coaches, etc.) are not prohibited facial classifications. If we were to find that any such difference between girls and boys sports is a facial classification, MHSAA argues, this would lead to absurd results. Facial classifications engender a presumption of discriminatory purpose, and MHSAA asserts that this is because there is typically a reason to infer antipathy—a reason, it claims, not present here.

MHSAA's characterization of the issue, however, misses the point. The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment. Disparate treatment does not arise from any and all differences in treatment; it occurs only where the offending party "*treats some people less favorably* than others because of their race, color, religion, sex, or national origin." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (emphasis added). Thus, the reason that scheduling differences properly receive disparate treatment analysis based on facial discrimination is not just because boys and girls are separated, but because they are separated and treated unequally in the scheduling of seasons.

In sum, MHSAA has failed to satisfy its burden of justifying its discriminatory scheduling practices under *V.M.I.* We therefore uphold the district court's grant of relief to CFE on the equal protection claim.

D. Title IX

1. Applicability of Title IX

Title IX, enacted as part of the Education Amendments of 1972, proscribes gender discrimination (with certain exceptions not applicable here) in educational programs receiving federal financial assistance. 20 U.S.C. § 1681(a). The statute provides, in pertinent part, that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Before Title IX was amended by the Civil Rights Restoration Act in 1987, the statute was construed by the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 574-75, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984), as being program specific, meaning that Title IX was interpreted as not providing institution-wide coverage. *See also Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) (recounting the history of Title IX). Congress responded to the Supreme Court's holding in *Bell* by adding § 1687 to Title IX, which provides in pertinent part as follows:

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of –
>
> . . .
>
> (2)(B) a local educational agency, system of vocational education, or other school system; . . . *any part of which* is extended Federal financial assistance.

Horner, 43 F.3d at 271 (quoting 20 U.S.C. § 1687) (emphasis added by the court).

The legislative history concerning this amendment explains that Congress sought "to restore the broad scope of coverage and to clarify the application of title IX of the

Education Amendments of 1972 . . . ." S. Rep. No. 64, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 3, 6. As stated in *Horner*, "the definitions of 'program or activity' and 'program' make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." 43 F.3d at 271 (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 3, 6) (quotation marks omitted).

MSHAA's brief on remand concedes that it is subject to Title IX. ("[MHSAA] represented to the Supreme Court that it would waive its argument that Title IX does not apply if the Court granted review of the preclusion issue. As a consequence, MHSAA does not now contest that it is subject to Title IX for purposes of this case."). Our only focus, then, is on whether MHSAA actually violated Title IX.

2. Intentional discrimination under Title IX

MHSAA contends that the district court erred in finding that MHSAA violated Title IX because, according to MHSAA, CFE had to offer proof of discriminatory animus on MHSAA's part. But this argument lacks merit for the same reasons that MHSAA's analogous argument regarding equal protection, discussed above, lacks merit. The district court noted that a Title IX violation, like an equal protection violation,

> does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated.

Cmtys. for Equity, 178 F. Supp. 2d at 856. *Horner ex rel. Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000), relied upon by MHSAA, is inapposite

because it addressed a facially neutral policy challenged under a disparate-impact theory. The policy challenged in *Horner* allowed the introduction of a new sport only if 25% of the member schools indicated a willingness to participate. This is quite different than the explicit gender-based scheduling policy in effect here. We therefore agree with the district court that proof of a discriminatory motive is not required for a Title IX claim based upon disparate treatment, and uphold its judgment in finding that MHSAA is in violation of Title IX.

E. Michigan's Elliott-Larsen Civil Rights Act

MHSAA's next argument addresses Michigan's Elliott-Larsen Civil Rights Act, M.C.L.A. §§ 37.2101-37.2804, which, among other things, proscribes gender discrimination in the provision of public services and public accommodations. M.C.L.A. § 37.2302(a). Section 37.2302(a) provides in pertinent part as follows:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sex . . . .

The district court determined that MHSAA constitutes a "person" under the statute, defined as "[a]n individual, agent, association, corporation, . . . unincorporated association, the state or a political subdivision of the state, or any agency of the state, or any other legal or commercial entity." M.C.L.A. § 37.2103(g). MHSAA does not contest the conclusion of the district court on this point.

"Place of public accommodation" is defined in the statute as

> a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed

> or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

M.C.L.A. § 37.2301(a).

And "public service" is defined as

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public . . . .

M.C.L.A. § 37.2301(b).

MHSAA argues that the district court erred in finding that MHSAA serves as a "public accommodation" and provides a "public service." The case most directly on point on these issues is *Rogers v. International Association of Lions Clubs*, 636 F. Supp. 1476, 1479 (E.D. Mich. 1986), where the district court found that a Lions Club qualified as a place of public accommodation providing public services. The Lions Club qualified as "a place of public accommodation" because its meetings are held in a public place (a Howard Johnson's restaurant), the meetings are open to the public, and the volunteer efforts of the Lions Club's members are made available to the public. *Id.* As the district court noted, MHSAA sponsors championship athletic tournament events that are held in public places and open to members of the general public. *Cmtys. for Equity*, 178 F. Supp. 2d at 859. Competitions are also held in public places for which MHSAA facilitates the scheduling. The district court in *Rogers* further considered whether the Lions Club provided a "public service." 636 F. Supp. at 1479. After noting that the Club is a tax-exempt, nonprofit private agency whose stated purpose is to provide volunteer public service through its members, the court concluded that the Club provides a public service. *Id.* MHSAA is likewise a tax-exempt entity that provides a service to the

public—"the organization of interscholastic athletics in the state's schools." *Cmtys. for Equity*, 178 F. Supp. 2d at 859. The district court therefore determined that MHSAA qualifies as providing a "public service" under Michigan law.

We conclude that the district court did not err in finding that MHSAA, like the Lions Club discussed in *Rogers*, qualifies as "providing a public service" and as a "place of public accomodation." MHSAA's unsupported contentions to the contrary are not persuasive. It cites *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026, 1036 (6th Cir. 1995), for example, to support its argument that it is not a "place of public accommodation." *Sandison*, however, is inapposite. Although this court in *Sandison* held that MHSAA was not a "place of public accommodation" within the meaning of the Americans with Disabilities Act (ADA), that was because the ADA narrowly defines "a place of public accommodation" as a "facility." *Id.* The ADA's definition differs from the broader definition under the Elliott-Larsen Civil Rights Act. Moreover, even if we were to hold that MHSAA is not a "place of public accommodation" under Elliott-Larsen, MHSAA would still be subject to the Act because it provides a "public service." We therefore uphold the determination of the district court that MHSAA is in violation of Michigan's Elliott-Larsen Civil Rights Act.

F. Compliance plan

After finding that MHSAA's scheduling of high school athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act, the district court ordered MHSAA to "bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year." *Cmtys. for Equity*, 178 F. Supp. 2d at 862. MHSAA was required to submit a compliance plan to the court by June 24, 2002. *Id.*

After MHSAA filed its proposed compliance plan, CFE and the Department of Justice filed responses, arguing that MHSAA's plan failed to remedy the inequities that existed in the scheduling of Michigan's high school athletics seasons. The Department of Justice noted that "the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools."

In August of 2002, the district court rejected MHSAA's proposed plan as not achieving equality and offered MHSAA three options:

(1) combine all sports seasons so both sexes' teams play in the same season . . . and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.

MHSAA selected the second option in the amended compliance plan that it filed with the district court in October of 2002.

Although MHSAA argues that the district court erred in rejecting its initial compliance plan, we must determine whether appellate jurisdiction exists to hear the issue before we can address the merits of this argument. CFE contends that MHSAA failed to appeal the compliance-plan order because MHSAA's January 2002 notice of appeal references only the opinion, judgment, and injunctive order entered in December of 2001. MHSAA did not file an amended notice of

appeal following the district court's rejection of MHSAA's initial compliance plan in August of 2002.

We lack jurisdiction over issues that are the subject of post-judgment motions when those issues are not included in a notice of appeal. In *United States v. Warner*, 10 F.3d 1236 (6th Cir. 1993), for example, this court held that "by being a distinct appealable order from which a separate appeal must be taken," a denial of a motion for new trial

> is subject to the requirement that the appeal be taken within ten days from the docketing of the district court's order. Absent an appeal within this time, or an extension from the district court for filing the notice of appeal, this court, being without authority to extend the time for filing a notice of appeal, will lack the jurisdiction to hear the appeal.

Id. at 1240. Because MHSAA did not file an amended notice of appeal following the district court's rejection of the initial compliance plan, we have no jurisdiction to consider MHSAA's argument concerning the same.

G. Judge Enslen's refusal to recuse himself

In 1983, MHSAA filed suit against the United States Department of Education and the Office of Civil Rights in the case of *Michigan High School Athletic Association v. Bell*, No. 83-CV-6250-AA (E.D. Mich. 1983), seeking a declaratory judgment and injunctive relief. Judge Enslen, the district court judge in the present case, recused himself from the 1983 case for reasons that no one, including Judge Enslen, can presently recall. MHSAA nevertheless argues that because Judge Enslen recused himself then, he should have recused himself now.

The evidence of record does not explain why Judge Enslen recused himself from the 1983 case. And in denying MHSAA's motion for disqualification in this case, Judge Enslen stated that he could think of no reason why he would be unable to remain impartial. Judge Enslen also noted that "only one of the 21 Defendants in the current case was a

party to the 1983 case, and none of the class Plaintiffs in the current case was involved in the 1983 case." Because MHSAA failed to provide any valid basis for Judge Enslen's recusal, we uphold the ruling of the district court denying its motion. *See Person v. General Motors Corp.*, 730 F. Supp. 516, 518-19 (W.D.N.Y. 1990) (stating that a judge's recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that party).

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT:

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I agree with the majority's holding that MHSAA's scheduling of high school athletic seasons violates Title IX and the Elliot-Larsen Civil Rights Act. I write separately because I do not believe we are bound by the holding in *Lillard* and thus, the question of whether Title IX supplants equal protection claims brought pursuant to § 1983 is one of first impression in this circuit. After applying the test in *Smith v. Robinson*, and having due regard for the Supreme Court's direction that this case was to be "remanded...for further consideration in light of *Rancho Palo Verdes v. Abrams*" ("*Rancho*"), I conclude that Title IX supplants plaintiffs' gender-based equal protection claims brought pursuant to § 1983.

I. *The Effect of Lillard*

The majority finds that *Lillard v. Shelby County*, 76 F.3d 716 (6th Cir. 1996), is controlling and thus that the issue of whether Title IX supplants an equal protection claim brought pursuant to § 1983 has already been decided. Yet, the majority fails to distinguish the type of claims brought pursuant to § 1983. In *Lillard*, the issue was not whether Title IX precluded an *equal protection* claim, but whether it precluded a *substantive due process* claim.

Lillard was a sexual harassment case. This case is one of sexual discrimination. In *Lillard* the issue was whether Title IX precluded substantive due process claims brought pursuant to § 1983. In this case, the issue is whether Title IX precludes equal protection claims brought pursuant to § 1983. This is a key difference and one deserving of a separate analysis. As explained by one scholar:

> A victim of sexual harassment by a teacher would have several constitutional *Section 1983* claims against the teacher and the school district. She might bring claims based on: (1) the Fourteenth Amendment right to due process, alleging a denial of a fair hearing in which to bring her complaint; (2) *the liberty interest in bodily integrity under the substantive due process right in the Fourteenth Amendment*; and (3) *the right under the Equal Protection Clause of the Fourteenth Amendment to be free from discrimination on the basis of sex.* Because Title IX confers on plaintiffs a right to be free from discrimination on the basis of sex, the plaintiff's third Constitution-based Section 1983 claim is "virtually identical" to the right conferred by Title IX...
>
> A court confronted with these remaining Constitution-based Section 1983 claims must determine whether either claim is virtually identical to the right under Title IX against discrimination on the basis of sex...[N]either procedural nor substantive due process rights are identical to, or even virtually identical to, rights under Title IX, which affords protection against discrimination on the basis of sex. Consequently, if a plaintiff brings procedural and substantive due process claims under Section 1983, those claims would not be precluded by Title IX, for they do not satisfy the first prong of the Smith test.

Zwibelman, Michael, WHY TITLE IX DOES NOT PRECLUDE SECTION 1983 CLAIMS, 65 U. Chi. L. Rev. 1465, 1479 (Fall 1998); *see also* Burke, Beth, TO PRECLUDE OR NOT TO PRECLUDE, 78 Wash. U. L.Q. 1487, 1512 (noting that some courts fail to apply properly the "virtually identical" prong of the Smith test by "combin[ing] all the alleged constitutional violations without analyzing each claim separately under the *Smith* test"). While this is just one scholar's view regarding which type of constitutional claims should be precluded, it demonstrates the problem: this circuit has previously determined that due process claims are not "virtually identical" to Title IX claims, but we have not yet held that equal protection claims are not "virtually identical" to Title IX claims.

I believe we are required to do such a separate analysis under the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). In *Smith*, the petitioners alleged violations of the Education of the Handicapped Act ("EHA") and of *both* equal protection and due process. Tellingly, the Court did not combine the alleged due process and equal protection violations in its discussion of preclusion; rather, the Court was prepared to analyze each claim separately. The Court first found that EHA claims were virtually identical to the claims brought under the Equal Protection Clause and that Congress intended that equal protection claims be precluded. Next, the Court was prepared to separately address "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." *Id.* at 1013-1014, 104 S. Ct. 3457. However, the Court found such analysis "unnecessary" because, even if the petitioners could maintain a due process challenge, they were not entitled to attorney's fees. The opinion in *Smith* illustrated that for each constitutional claim, a court must engage in a separate analysis of whether that claim, provided for by a statutory remedy, is precluded from being brought under § 1983, another statutory remedy.

Even though *Lillard* addressed the preclusion of different right, the majority holds we are bound by it. I see several problems with not addressing the precise issue before us. First, it contradicts the procedure set forth by the Court in *Smith*. For, if finding what Congress intended with respect to one constitutional claim - say equal protection - is enough to find what Congress intended with respect to all constitutional claims, then why was the Court prepared to do two separate analyses?[1] In other words, if the majority's position is correct, that a holding that Congress did not intend a statute to be the "exclusive avenue" for bringing one type of constitutional claim applies to all constitutional claims brought pursuant to § 1983, then, according to the majority, the Supreme Court was prepared to engage in a meaningless exercise of addressing whether "the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." *Id.* According to the majority view, the Court had already decided this issue when it discussed what Congress intended with respect to equal protection claims.

Secondly, to say that what Congress intended with respect to one type of constitutional claim is what Congress meant with respect to all, is an overly-simplistic justification

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[1] The majority answers this question by acknowledging that the *Smith* Court "did in fact contemplate two separate analyses," but by reasoning that a separate analysis was warranted in *Smith* - and not in this case - because there was a "clear textual indication" in the EHA that Congress intended for that statute to preclude equal protection claims brought pursuant to § 1983. Op. at 9. By distinguishing *Smith* in this way, the majority is treating implied rights as second-class rights as they are undeserving of a separate analysis. The Court has not indicated in either *Smith* or *Sea Clammers* that implied rights are to be treated differently than express and I decline to do so here. For, as I explain later, once we include the implied rights to bring individual actions, including damages, as what Congress intended and read Title IX to so provide, Congress has provided a statutory remedy for gender-based equal protection claims so that § 1983 is not available for equal protection actions.

for the majority's decision. When ascertaining Congress' intent, I believe we have to do so with the precise rights in mind. I do not think one can assume that simply because Congress did not intend to preclude substantive due process claims, it did not intend to preclude equal protection claims. It seems clear to me that Congress could intend to preclude one type of constitutional claim, by providing a statutory remedy for it, but not others.

In *Lillard* this court found the claims at issue were not "virtually identical" to those provided in Title IX. *Lillard*, 76 F.3d at 723. I agree, as the plaintiff in *Lillard* alleged sexual harassment and Title IX was designed to target gender discrimination. While I recognize the court in *Lillard* summarily concluded these claims were not "virtually identical," that does not take away from the fact that because the claims were so different, there is further reason to assume Congress did not intend to preclude the use of § 1983. Similarly, where the claims are "virtually identical," as I believe they are in this case, there seems to me more reason to assume Congress intended to preclude use of § 1983 to enforce those claims. Thus, when a court finds the first part of the *Smith* test is not satisfied (are the claims virtually identical), the answer to the second (did Congress intend that the statute supplant the constitutional claims), seems obvious. It only makes sense to conclude that when a constitutional claim is not virtually identical to the statutory claim, Congress did not intend to preclude the former.

Third, it is important to point out that the court in *Lillard* did not indicate its holding was to be extended to the preclusion of rights other than substantive due process. The court in *Lillard* concluded that the rights were not "virtually identical" but then went on to discuss, at length, congressional intent. The court reasoned that because the private right of action found in Title IX was implied, rather than express, Congress did not intend to preclude due process claims when it enacted Title IX. There was no indication that this logic regarding implied rights was meant

to extend to other constitutional rights beyond substantive due process. The court limited its finding, stating, "the *National Sea Clammers* doctrine presents no impediment to the plaintiffs' pursuit of remedies for alleged violations of *substantive due process*." *Lillard*, 76 F.3d at 724 (emphasis added). More importantly, the court indicated its finding regarding congressional intent was dicta, concluding that, "*even if* the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights, rather than their constitutional rights, through section 1983, *National Sea Clammers* would have provided no support." *Lillard*, 76 F.3d at 723 (emphasis added).[2]

For the foregoing reasons, I believe that we need to engage in a separate analysis as required by the Supreme Court in *Smith* and that we must address this issue as one of first impression in this circuit.

II. *Applying Smith v. Robinson's Two-Prong Test*

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[2] The defendants in *Lillard* argued that due process claims brought pursuant to § 1983 should be precluded by Title IX under the *Sea Clammers* doctrine. The *Lillard* court pointed out that *Sea Clammers* did not apply to the preclusion of constitutional claims, only the preclusion of statutory claims, stating:

> There are two important distinctions that make the *National Sea Clammers* doctrine inapposite here. First, and most crucial, is the fact that in *National Sea Clammers*, the plaintiffs' section 1983 action sought to enforce the rights created by federal statutes which did not provide for a private right of action, while here, the plaintiffs' section 1983 claims are premised on alleged *constitutional* violations. Thus, while in *National Sea Clammers*, allowing the section 1983 action to enforce the rights at issue would have effectively circumvented the implicit congressional intention to foreclose private rights of action, here, the plaintiffs' section 1983 action does not attempt either to circumvent Title IX procedures, or to gain remedies not available under Title IX... Instead, the plaintiffs seek to enforce wholly independent, and totally distinct, substantive due process rights.

Lillard, 76 F.3d at 722-723 (citation omitted).

In *Smith*, the Supreme Court established a two-prong test for determining whether § 1983 claims predicated on constitutional rights are precluded by statute: first, courts must address whether the rights underlying the § 1983 claim are "virtually identical" to the rights in the relevant statute; second, courts must address whether Congress intended the statute to be the "exclusive avenue" for asserting those rights. 468 U.S. at 1009, 104 S. Ct. 3457. As discussed, I believe the rights conferred in Title IX - to be free from discrimination on the basis of sex - are virtually identical to those granted in the Equal Protection Clause. The next issue then, and the one requiring further analysis, is whether Congress intended Title IX to be the "exclusive avenue" for bringing those gender-based equal protection claims. In other words, by enacting Title IX, did Congress intend to preclude reliance on § 1983, a separate statute, to remedy an equal protection violation? Smith, 468 U.S. at 1012, 104 S. Ct. 3457.

As a preliminary matter, I want to express my disagreement with the rationale behind one holding in *Lillard* that Title IX does not supplant due process claims brought pursuant to § 1983. The court reasoned that because the private right of action was *implied* rather than express, Congress did not intend it to be the exclusive avenue for bringing constitutional claims. I find this reasoning unpersuasive for two reasons. First, I believe it undermines the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). In *Cannon*, the Court found Congress intended to create a private judicial remedy in Title IX and we should not second-guess that holding. The intent found by the Supreme Court, although implied, should be given the same weight as expressed intent. Second, the opinion in *Lillard* is silent with respect to the fact that *after* the Supreme Court's holding in *Cannon*, but prior to the decision in *Lillard*, Congress essentially ratified the Supreme Court's holding in *Cannon* by subsequently

enacting two legislative provisions which did not interfere with the implied right, the Civil Restoration Act of 1987 and the Rehabilitation Act Amendments of 1986. This point was acknowledged by the Supreme Court in *Franklin v. Gwinnett County Public Schools*, where the Court held a person could receive both compensatory and punitive damages in a private action for sex discrimination. *Franklin*, 503 U.S. 60, 72, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992). The Court noted that while Congress had an opportunity to abrogate the implied right of action found in *Cannon*, it remained silent stating, "[o]ur reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX," *id.*, and later that:

> In seeking to correct what it considered to be an unacceptable decision on our part in *Grove City College v. Bell*, Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right. We cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX.

Id. at 73, 112 S. Ct. 1028. Thus, I am not persuaded by the argument that because the private right of action in Title IX was implied by the Supreme Court, this court is prevented from finding Congress intended Title IX to supplant gender-based equal protection claims. With this in mind, I now address whether Congress intended to preclude equal protection gender-based § 1983 claims.

In ascertaining Congress' intent in this case, I believe we should first look to the decision the Supreme Court asked us to consider on remand, *Rancho Palos Verdes*. 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005). I agree

with the majority's finding that the case before us is a *Smith* case rather than a *Sea Clammers* case in that it deals with both constitutional and statutory rights. Further, I agree that *Rancho* is a *Sea Clammers* decision. However, I still believe that we should consider the Court's holding in *Rancho*, specifically, the potential reach of the Court's holding.

Prior to *Rancho*, courts applied no inference regarding congressional intent. The Court in *Rancho* changed that and, where a judicial remedy exists in a statute, made it much easier to infer that Congress intended to preclude reliance on § 1983. While the Court declined to hold that the "availability of a private judicial remedy...conclusively establishes a congressional intent to preclude § 1983 relief," *id.* at 1459, the Court did state that the availability of such a remedy in the statute would give rise to an, " *ordinary inference* that the remedy provided in the statute is exclusive," but such an inference, "can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983" *id.* at 1459 (emphasis added). Again, I recognize that factually *Rancho* is analogous to *Sea Clammers* in that it involved two statutes. However, worth mentioning, is the fact that the reasoning behind this inference was not limited to *Sea Clammers* cases. Rather, the Court spoke at length about *both Sea Clammers* and *Smith* in articulating this rule:

> We have found § 1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith*. Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself...
>
> The Government as *amicus*, joined by the City, urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief. We decline to do so.

Rancho Palos Verdes, 125 S. Ct. at 1459 (citations omitted). Because the Court analyzed *Sea Clammers* (only statutory claims) and *Smith* (statutory and constitutional claims) and their progeny and found that in both types of cases the pivotal issue was whether the statute at issue provides for a private judicial remedy, the discussion leading up to the establishment of the inference adopted in *Rancho* suggests that it does not apply solely to *Sea Clammers* cases. There is an argument that such an inference applies to *Smith* cases as well. Yet, as this case can be decided under the standard set forth in *Smith*, I find it unnecessary to apply the *Rancho holding* to decide this case; however, I believe the *reasoning* in *Rancho* suggests we should conclude that Congress, by enacting Title IX, intended to preclude reliance on § 1983 as a remedy for an equal protection claim.

Again, under the test in *Smith*, we must ask whether Congress intended Title IX to be the "exclusive avenue" through which a plaintiff may assert an equal protection claim. I believe we must address this question with the relevant Supreme Court decisions in mind. In *Cannon*, the Supreme Court applied the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), to hold that Title IX created a private right of action. The second *Cort* factor asks whether "any indication of legislative intent, explicit or implicit, either to create a remedy or deny on" exists. *Id.* The court in *Cannon* found that,"[f]ar from evidencing any purpose to deny a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy." *Cannon*, 441 U.S. at 694. In *Franklin*, the Court went on to hold that "Congress did not intend to limit the remedies available in a suit brought under Title IX." *Franklin*, 503 U.S. at 72, 112 S. Ct. 1028. Finally, in *Rancho* the Court established the above-discussed inference. Again, while we need not extend the *Rancho* holding to *Smith* cases, I believe the *reasoning* sheds some light on how we should dispose of the case before us. As emphasized by the Supreme Court, the central

issue in both *Smith* and *Sea Clammers* cases has been, and is, whether the statute at issue provides for a judicial remedy:

> [I]n *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith, did not* provide a private judicial remedy (or, in most cases, even a private administrative remedy) for the rights violated.

Rancho, 125 S. Ct. at 1459. Title IX, like the statutes at issue in *Sea Clammers* and *Smith*, does provide for both a private right of action and for damages. Thus, because the Supreme Court has held Congress intended to create a private judicial remedy in Title IX, and because the non-existence of such a remedy has repeatedly given rise to a finding that Congress did not intend to preclude relief sought through § 1983, I would hold that Congress did intend for Title IX to be the "exclusive avenue" through which a plaintiff may assert a gender-based equal protection claim.

SUPREME COURT OF THE
UNITED STATES

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, PETITIONER v. COMMUNITIES FOR EQUITY, ON BEHALF OF ITSELF, ITS MEMBERS AND ALL OTHERS SIMILARLY SITUATED, ET AL.

No. 04-1021

May 2, 2005, Decided

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Motion of Michigan Interscholastic Athletic Administrators Association for leave to file a brief as amicus curiae granted. Motion of Michigan Association of School Boards for leave to file a brief as amicus curiae granted. Motion of Basketball Coaches Association of Michigan for leave to file a brief as amicus curiae granted. Motion of National Federation of State High School Associations for leave to file a brief as amicus curiae granted. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 161 L. Ed. 2d 316, 125 S. Ct. 1453 (2005).*

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, on behalf of itself, its members and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., on behalf of itself and its members,
Defendant-Appellant.

No. 02-1127

Argued: June 17, 2004.
Decided and Filed: July 27, 2004.
Rehearing En Banc Denied November 9, 2004.

Before: KENNEDY and GILMAN, Circuit Judges; SHADUR, District Judge.*

OPINION

GILMAN, Circuit Judge.

Communities for Equity—an organization of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity in athletics—and the individual plaintiffs (collectively, CFE) brought a class

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* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

action lawsuit against the Michigan High School Athletic Association (MHSAA), arguing that MHSAA's scheduling of high school sports seasons in Michigan discriminated against female athletes on the basis of gender. The district court concluded that MHSAA's actions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Educational Amendments of 1972, and Michigan's Elliott-Larsen Civil Rights Act. For the reasons set forth below, we AFFIRM the judgment of the district court with regard to the plaintiffs' Equal Protection claim, thus finding no need to reach the Title IX and state-law issues.

I. BACKGROUND

A. Factual background

At issue in this case is whether MHSAA's scheduling of athletic seasons and tournaments for six girls' sports—basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis—violates the law. With the exception of golf, all of these sports are scheduled during the nontraditional season (meaning a season of the year that differs from when the sport is typically played). *Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n.*, 178 F.Supp 2d 805, 807 (W.D.Mich.2001). Although Lower Peninsula girls' golf is played in the spring—the traditional season for golf—the fall season, when the boys play, is more advantageous. *Id.* No boys' sports are scheduled in nonadvantageous seasons. *Id.* at 838.

Girls have historically played in the less advantageous seasons because of the way that high school athletics developed in Michigan. MHSAA's executive director, John Roberts, explained in a 1990 article titled *Sports and Their Seasons*, published in MHSAA's Bulletin, that "[b]oys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program." *Id.* at 815.

In its findings of fact, the district court painstakingly discussed each sport at issue and analyzed why play in the nontraditional season (or, in the case of golf, in the traditional season) harmed female athletes. *Id.* at 817-836. Among the harms found by the district court are the following:

> [G]irls' basketball [is played] in the fall. Forty-eight states schedule girls' basketball in the winter....
>
> Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments....
>
> Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'"...
>
> Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season....
>
> [I]t is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on 'equal footing' with Michigan boys and with girls in the rest of the country with respect to collegiate recruiting....
>
> In volleyball, the non-traditional season is the disadvantageous season for girls....

Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. Forty-eight states play high school girls' volleyball in the fall. The NCAA schedules women's volleyball in the fall. Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball.

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV), rather than the high school programs ...

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season.

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are

openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing...." Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments....

[T]he Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan....

The NCAA schedules women's soccer in the fall....

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer....

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. Thus, the regular season starts later than scheduled. As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face....

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider....

The court finds that in Michigan, fall is the more advantageous season for playing high school golf....

Lower Peninsula girls' golf [is played] in the spring season....

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. Michigan girls only have three years because their season occurs after the letter of intent signing date ....

> The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall....
>
> [T]he Lower Peninsula girls' swimming and diving season [is] in the fall.
>
> [The] Lower Peninsula boys' swimming and diving season [is] in the winter.
>
> [T]he winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. Sectional and regional swim meets for U.S. Swimming take place in March. The Phillips 66 national swim championships are in March/April of each year. In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition....
>
> [T]he Court finds that spring is the more advantageous playing season for tennis....
>
> [Michigan] girls' tennis [is played] in the fall.
>
> Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play....

Id. at 817-836.

In addition to sport-specific harms, the district court found that the scheduling of seasons harmed Michigan girls

in ways that could be generalized across all sports. For example, "[w]hen girls are treated unequally as compared to boys, girls receive the psychological message that they are 'second-class' or that their athletic role is of less value than that of boys." *Id.* at 837.

The above-quoted findings are only a fraction of the harms that the district court found are experienced by female athletes in Michigan because of MHSAA's scheduling their seasons of play at disadvantageous times. A full recounting takes up 30 pages of the district court's opinion. *Id.* at 809-39.

MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." *Id.* at 810 (quotation marks omitted). MHSAA's Articles of Incorporation further illuminate that the purpose of MHSAA is

> to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with [the] educational values of the high school curriculums...

Id. at 811 (quotation marks omitted). Membership in MHSAA is open to all secondary schools in Michigan. To join MHSAA, a school district's board of education must agree to adopt MHSAA's rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." *Id.* (quotation marks omitted). Over 700 Michigan schools constitute the membership of MHSAA, more than 80% of which are public. *Id.* at 810.

Ticket sales to the state championship tournaments represent 86% of MHSAA's budget. *Id.* at 813. MHSAA member schools remit substantial portions of the gate receipts from their participation in the tournament events to MHSAA. *Id.* Other sources of revenue include tournament concessions, fees from the registration of game officials, advertising in tournament programs, corporate sponsorship,

and royalties from television and radio broadcasts of MHSAA tournament events. *Id.*

General control over interscholastic athletic policies is vested in the Representative Council. *Id.* at 812. Nineteen voting members constitute the Council, fourteen of whom are elected by member schools, four of whom are appointed by the Council, and one of whom is a representative of the State Superintendent of Education. *Id.* All members of the Council, with the exception of the representative of the State Superintendent, must be either members of the faculty or board of education of MHSAA-member schools. *Id.* Seventeen of the nineteen members of the Council in 2000-2001 were either employees or representatives of public schools or public school districts. *Id.*

The district court found that high school athletic seasons in Michigan are determined by MHSAA. *Id.* at 814. MHSAA prescribes when practice and competition may start, when competition ends, and the maximum number of games that may be played. Practice outside of the dates set by MHSAA is prohibited. Member schools are not permitted to engage in any competition after the end of the MHSAA season or the end of the state championship tournament in any sport, whichever is last. According to MHSAA rules, athletes may not participate in both interscholastic and amateur club sports in the same sport during the same season. Within the MHSAA-determined seasons, member schools set their own practice schedules and game dates. *Id.*

State championship tournaments are sponsored by MHSAA in twelve boys' sports and twelve girls' sports. *Id.* Only MHSAA-member schools who comply with MHSAA's rules and regulations may participate in these tournaments. *Id.*

B. Procedural background

In June of 1998, CFE filed the present lawsuit, alleging that MHSAA discriminated against female athletes. The district court denied two successive motions for summary judgment filed by MHSAA. MHSAA then filed a motion to

dismiss, which was granted in part, dismissing all of CFE's disparate-impact claims.

From September 24 through October 4, 2001, the district court conducted a bench trial on the remaining claims. The court handed down its decision on December 17, 2001, holding that MHSAA's scheduling of female sports seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX (20 U.S.C. §§ 1681-1688), and Michigan's Elliott-Larsen Civil Rights Act (Mich. Comp. Laws Ann. §§ 37.2101-37.2804). *Cmtys. for Equity*, 178 F.Supp 2d at 862.

As part of its ruling, the district court enjoined MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. The court retained jurisdiction over the case, ordering MHSAA to submit a Compliance Plan so that an appropriate remedy could be implemented. *Id.* MHSAA's initial Compliance Plan was rejected by the court, but a revised plan was filed by MHSAA in October of 2002 and subsequently approved.

II. ANALYSIS

A. Standard of review

Questions of constitutional interpretation are issues of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir.2004). The district court's findings of fact, on the other hand, will not be set aside unless they are determined to be clearly erroneous. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir.2003).

B. Equal Protection

1. State action

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Pursuant to 42 U.S.C. § 1983,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a "state actor." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir.1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.") (quotation marks and citation omitted). As a threshold issue, therefore, we must determine whether MHSAA is a state actor.

In determining that MHSAA is a state actor, the district court relied upon the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001). *Cmtys. for Equity*, 178 F.Supp 2d at 846-848. The *Brentwood Academy* case addressed the issue of whether the Tennessee Secondary School Athletic Association (TSSAA), which was "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school. *Id.* at 290, 121 S. Ct. 924. Because of "the pervasive entwinement of state school officials in the structure of the association," the Court held that TSSAA's regulatory activity constituted state action. *Id.* at 291, 121 S. Ct. 924. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry," *id.* at 298, 121 S. Ct. 924 (quotation marks omitted), and noted that

state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295, 121 S. Ct. 924 (quotation marks omitted).

Public schools constituted 84% of TSSAA's membership, the Court noted, and school faculty and administrators provided TSSAA's leadership. *Id.* at 298, 121 S. Ct. 924. The Court was also influenced by the fact that TSSAA's primary revenue source was gate receipts from tournaments between TSSAA-member schools. *Id.* at 299, 121 S. Ct. 924. In conclusion, the Court stated that,

> to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299-300, 121 S. Ct. 924. The Court also found significant that TSSAA ministerial employees were treated like state employees by virtue of their eligibility for membership in the state retirement system. *Id.* at 300, 121 S. Ct. 924.

MHSAA's stated purpose, "[t]o create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state," is virtually identical to that of its Tennessee counterpart. *See id.* at 290, 121 S. Ct. 924. Like TSSAA, MHSAA's membership is composed primarily of public schools. And, similar to TSSAA, public school teachers, administrators, and officials dominate MHSAA's leadership. Another common feature is that the bulk of MHSAA's revenue comes from ticket sales for state

championship tournaments. Finally, MHSAA employees who had state teaching certificates were, until January of 1988, considered state employees and were therefore eligible to participate in the state's retirement system. Employees who started working for MHSAA before January of 1988 continue to be members of the state employees' retirement system. *Cmtys. for Equity*, 178 F.Supp 2d at 813.

We therefore conclude that MHSAA is so entwined with the public schools and the state of Michigan, and that there is "such a close nexus between the State and the challenged action," *Brentwood Academy*, 531 U.S. at 295, 121 S. Ct. 924 (quotation marks omitted), that MHSAA should be considered a state actor. Tellingly, MHSAA argued earlier in this litigation, before the Supreme Court reversed this court's opinion in *Brentwood Academy*, 180 F.3d 758 (6th Cir.1999), that "the nature and function of the MHSAA is virtually identical to that of the TSSAA." *Cmtys. for Equity*, 178 F.Supp 2d at 847. MHSAA, in sum, has failed to present any compelling argument to distinguish itself from TSSAA. We therefore affirm the determination of the district court that MHSAA is a state actor.

2. Denial of Equal Protection

The Supreme Court has held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996) (dealing with the admission of women to the Virginia Military Institute, hereafter referred to as *VMI*). In *VMI*, the Court further explained the State's burden under the heightened standard for gender-based classifications:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the

> reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33, 116 S. Ct. 2264 (quotation marks and citations omitted).

The district court analyzed the scheduling of the Michigan athletic seasons under *VMI's* standard, determining that MHSAA had to show that scheduling team sports in different seasons based on gender "serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." *Cmtys. for Equity*, 178 F.Supp 2d at 850. In addition, the district court noted that MHSAA's justifications must be "exceedingly persuasive." *Id.* (quotation marks omitted). MHSAA asserted that the scheduling decisions were designed to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team." *Id.*

Conceding that MHSAA's logistical concerns were important, the district court concluded that MHSAA had failed to demonstrate, pursuant to the standards set forth in *VMI*, that discriminatory scheduling was "'substantially related' to the achievement of those asserted objectives."

Id. at 850-51. MHSAA's reliance upon anecdotal and "weak circumstantial" evidence was found insufficient to carry its burden. The district court also pointed out that *even if* MHSAA had sufficiently proven the point about athletic-participation opportunities, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." *Id.* at 851.

On appeal, MHSAA reiterates its argument made below that the purpose of separate athletic seasons for boys and girls is to maximize opportunities for athletic participation. MHSAA asserts that statistics showing that Michigan has a higher number of female participants in high school athletics than most states satisfies the requirements of *VMI*. An "unavoidable consequence of separate teams," according to MHSAA, "was accommodation of twice the number of teams, games and participants."

The evidence offered by MHSAA, however, does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. MHSAA argues that bare participation statistics "*are the link* showing that separate seasons are substantially related to maximum participation." (Emphasis added.) But a large gross participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

MHSAA also contends that it cannot be liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent. It points out that "[t]here is no evidence that MHSAA [] scheduled [] sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." This argument appears to confuse intentional discrimination—i.e., an intent to treat two groups differently— with an intent to harm. As stated above, Equal Protection analysis requires MHSAA to show

that its disparate treatment of boys and girls "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *VMI*, 518 U.S. at 533, 116 S. Ct. 2264.

Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon CFE to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls. The cases that MHSAA cites to the contrary, such as *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991), are inapposite because they involve facially neutral classifications, rather than facially gender-based classifications. In *Hernandez*, for example, the Court analyzed a racially-neutral explanation for a prosecutor's exercise of peremptory strikes in picking a jury, noting that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 111 S. Ct. 1859. The facts of the present case are quite different from those of *Hernandez*.

In sum, we do not find that MHSAA's justification for its scheduling practices is "exceedingly persuasive" in meeting the heightened standard required by *VMI* for the gender-based classifications. *See VMI*, 518 U.S. at 532-33, 116 S. Ct. 2264. We therefore affirm the district court's grant of relief to CFE on the Equal Protection claim.

C. Compliance Plan

Upon finding that MHSAA's scheduling of high school athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act, the district court ordered MHSAA to "bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year." *Cmtys. for Equity*, 178 F.Supp 2d at 862. MHSAA was

required to submit a Compliance Plan to the court by June 24, 2002. *Id.*

After MHSAA filed its proposed Compliance Plan, CFE and the Department of Justice filed responses, arguing that MHSAA's plan failed to remedy the inequities that existed in the scheduling of Michigan's high school athletics seasons. The Department of Justice noted that "the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools."

In August of 2002, the district court rejected MHSAA's proposed plan as not achieving equality. The court offered MHSAA three options:

> (1) combine all sports seasons so both sexes' teams play in the same season ... and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.
>
> MHSAA selected the second option in the amended Compliance Plan that it filed with the district court in October of 2002. The amended plan was approved by the court the following month.

MHSAA contends that the district court erred in rejecting MHSAA's initial Compliance Plan. Before we can address the merits of this argument, however, we must

determine whether appellate jurisdiction exists to hear the issue.

CFE argues that MHSAA failed to appeal the Compliance Plan order, pointing out that MHSAA's January 2002 Notice of Appeal references only the opinion, judgment, and injunctive order entered in December of 2001. MHSAA did not file an amended Notice of Appeal following the district court's rejection of its initial Compliance Plan in August of 2002.

The appellate courts lack jurisdiction over issues that are the subject of post-judgment motions, such as a motion for a new trial, when arguments in those motions are not included in a Notice of Appeal. In *United States v. Warner*, 10 F.3d 1236 (6th Cir.1993), for example, this court held that "by being a distinct appealable order from which a separate appeal must be taken," a denial of a motion for new trial

> is subject to the requirement that the appeal be taken within ten days from the docketing of the district court's order. Absent an appeal within this time, or an extension from the district court for filing the notice of appeal, this court, being without authority to extend the time for filing a notice of appeal, will lack the jurisdiction to hear the appeal.

Id. at 1240.

MHSAA did not file an amended Notice of Appeal following the district court's rejection of the initial Compliance Plan. We therefore conclude that this court lacks jurisdiction to consider MHSAA's argument concerning the rejection.

D. Judge Enslen's refusal to recuse himself

The final issue raised by MHSAA relates to the involvement of the district judge in the present case, Judge Enslen, in a case filed by MHSAA over twenty years ago. In 1983, MHSAA filed suit in the Western District of Michigan against the United States Department of Education and the Office of Civil Rights in the case of

Michigan High School Athletic Association v. Bell, No. 83-CV-6250-AA. Judge Enslen recused himself from the 1983 case for reasons that no one, including Judge Enslen, can presently recall. MHSAA nevertheless argues that because Judge Enslen recused himself then, he should have recused himself now.

The record before us does not explain why Judge Enslen recused himself from the 1983 case, but, in denying MHSAA's motion for disqualification, Judge Enslen stated that he could think of no reason why he would be unable to remain impartial. Judge Enslen also noted that "only one of the 21 Defendants in the current case was a party to the 1983 case, and none of the class Plaintiffs in the current case was involved in the 1983 case." Because MHSAA failed to provide any valid basis for Judge Enslen's recusal, we affirm the ruling of the district court in denying MHSAA's motion. *See Person v. General Motors Corp.*, 730 F.Supp. 516, 518-19 (W.D.N.Y.1990) (stating that recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that same party).

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court on the basis that MHSAA's actions regarding the scheduling of girls' sports seasons in Michigan violated the Equal Protection Clause of the Fourteenth Amendment.

UNITED STATES DISTRICT COURT,
W.D. MICHIGAN,
SOUTHERN DIVISION.

COMMUNITIES FOR EQUITY, et al., Plaintiffs,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant

No. 1:98CV479.

Dec. 17, 2001.
As Corrected Dec. 21, 2001.

OPINION

ENSLEN, District Judge.

"Change is the only constant. Hanging on is the only sin." -Denise McCluggage, U.S. race car driver, as quoted in *WomenSports* magazine, June 1977, at 18.

After a three and one-half year legal struggle, this case is finally ready for resolution. It began on June 26, 1998, when Plaintiffs, an organization named Communities for Equity and two mothers of female student-athletes suing on behalf of their minor daughters, filed a class action lawsuit alleging that the Michigan High School Athletic Association (MHSAA), MHSAA's executive director, and members of the MHSAA Representative Council[1] discriminated against female athletes.

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[1] MHSAA's executive director and members of the Representative Council have been referred to throughout the litigation as the "Individual Defendants." Plaintiffs' claims remain against only Defendant MHSAA.

Plaintiffs alleged that the discrimination against high school female athletes took a variety of forms, specifically naming seven areas of discrimination against female athletes. Once this case wound its way to bench trial before the Court, only one area of alleged discrimination remained for the Court's decision. The sole remaining area of alleged discrimination is the allegation that Defendant MHSAA schedules athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling of girls' athletic seasons constitutes legally inequitable treatment.

The scheduling of the girls' sports at issue involves volleyball in the winter, basketball in the fall, soccer in the spring, Lower Peninsula golf in the spring, Lower Peninsula swimming and diving in the fall, and tennis in the fall.[2] Specifically, Plaintiffs claim that all of these girls' sports, with the exception of girls' golf, are played in a non-traditional season, i.e., a season of the year different from when the sport is typically played, and that the non-traditional season is a disadvantageous time of the year to play the sport, causing inequities for girls. Lower Peninsula girls' golf is played in golf's traditional season of spring, but Plaintiffs claim that in the case of golf in Michigan, the non-traditional season of fall is far superior to the spring season, and fall is when Lower Peninsula Michigan boys play golf.

Plaintiffs' federal claims arise under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983 ; and Title IX of the Education Amendments of 1972, 20

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and not the Individual Defendants, who were dismissed from the lawsuit on a motion made pursuant to Fed.R.Civ.P. 52(c). (10/2/01 Order, Dkt. No. 507.)

[2] In the Upper Peninsula of Michigan, boys' and girls' golf are both played in the spring, and boys' and girls' swimming and diving are both held in the winter, so only the Lower Peninsula scheduling of these two sports is at issue in this lawsuit.

U.S.C. §§ 1681 *et seq.*, (Title IX). Plaintiffs' state law claim arises under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101 *et. seq*, specifically those sections barring discrimination in schools and in public accommodations and services. The Court has jurisdiction over Plaintiffs' state law claim through its supplemental jurisdiction.

Plaintiffs seek declaratory and injunctive relief and attorneys' fees. In terms of injunctive relief, Plaintiffs ask that the District Court require that male and female teams of the same sport be scheduled to play in the same season and that girls' volleyball be scheduled to play in the fall. In the alternative, if the Court finds adequate justification for scheduling female and male seasons differently, Plaintiffs ask this Court to require Defendant MHSAA to schedule the same number of male and female sports in non-traditional seasons, "so as to allocate the benefits and burdens of playing in different seasons equally between females and males."

Defendant MHSAA argues that its placement of the girls' sports seasons at issue is advantageous for female athletes and thus not discriminatory. The MHSAA also asserts that legitimate reasons exist for scheduling some male and female teams of the same sports in different seasons, reasons which mostly encompass asserted logistical difficulties in putting more students in one season.

The United States was granted *amicus curiae* status to brief the Court and participate in the trial on the issues of federal law presented. (9/7/00 Order, Dkt. No. 255.) The United States argues in favor of Plaintiffs' position in this matter.

A bench trial over eight days was held to allow the Court to hear from witnesses and to receive documentary exhibits in order to determine what the facts are and what legal conclusions are to be drawn from those facts. During this time, the Court heard from twenty-five witnesses and received 103 exhibits.

Federal Rule of Civil Procedure 52 requires that in cases tried without a jury, the Court shall make findings of fact separately from its conclusions of law. Fed.R.Civ.P. 52(a). Findings of fact shall not be set aside unless clearly erroneous. *Id.*

Much has been said in this case about what a "traditional" season is and what a "non-traditional" season is. For most sports, it is common knowledge when tradition dictates that a sport will be played. Ask almost any woman or man on the street when organized football, on any level, is played, and that person is sure to know that football is a fall sport.

In this case, the Court cares about traditional sports seasons only to the extent that a traditional season, or the season when the sport is usually played at most levels, happens to be the most advantageous playing season for the high school sports at issue in this case. So if girls play sports in non-traditional seasons when boys play in traditional seasons, that does not necessarily break the law, if girls and boys are equally advantaged by the season in which they play a sport.

But a tradition does not become a tradition simply because of random coincidence. A particular playing season often becomes the traditional season for a particular sport in the first place because certain advantages accrue to playing a sport in a certain season. For example, there is a reason why outdoor organized sports like soccer, tennis and football are not played in the winter in Michigan. Similarly, there are other reasons, perhaps less obvious to the casual observer than Michigan weather, why certain sports are not generally played in certain seasons.

The question for this Court is not whether the process through which the MHSAA came to the decisions that it has to schedule girls' sports where it does was fair. The question for this Court is also not whether this Court believes that the scheduling decisions of the MHSAA were wise. The question for this Court is whether the scheduling

decisions made by the MHSAA are legally permissible, and the Court has come to the conclusion that they are not. The MHSAA's seasons decisions are not permitted under the Fourteenth Amendment to the United States Constitution, Title IX, or Michigan's Elliott-Larsen Civil Rights Act.

The Court finds in favor of Plaintiffs and will order appropriate remedies as described herein.

FINDINGS OF FACT

I. THE PARTIES

A. Plaintiffs, Diane Madsen, Jay Roberts-Eveland, and Communities for Equity

Plaintiff Diane Madsen is a teacher for Kentwood Public Schools in the Grand Rapids area. (Trial Transcript[3] (Tr.) at 14:12-19, Diane Madsen Testimony.) Ms. Madsen filed suit on behalf of her three daughters, Katie, Kristi and Kelsey Madsen, who were all minors at the time the suit was filed. (*Id.* at 14:24-15:6; Stipulated (Stip.) Fact No. 28.) The Madsen daughters have participated in or are currently participating in high school sports at Grand Rapids Northview High School, a MHSAA member school. (Stip. Fact No. 15.) Katie, currently attending Aquinas College in Grand Rapids, played basketball and volleyball; Kristi, currently attending Cornerstone University, also in Grand Rapids, played softball, basketball, volleyball, tennis and was a member of the swim and dive team; and Kelsey, currently a junior at Northview High School, plays basketball and volleyball. (Tr. at 15:7-16:2, D. Madsen; Tr. at 90:15-22, Kristi Madsen.)

Ms. Madsen is also president of Plaintiff Communities for Equity (CFE). (Tr. at 23:22-24:12, D. Madsen.) Ms. Madsen testified that she viewed a number of areas in her children's school's girls' sports programs as highly

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[3] Citations are to the transcript prepared daily by the Court's Official Court Reporter Kathleen S. Thomas for the parties during trial.

inequitable, compared to boys' sports programs, and she subsequently became interested in changing the situation. (*See, e.g., id.* at 16:7-19:7.) Ms. Madsen and other parents with similar concerns at other schools began to meet to discuss the issue, and CFE was formed. (*Id.* at 23:6-21.)

CFE was founded by parents and student-athletes in 1997 "to educate people about the compliance of Title IX, about gender equity in general in athletics, and to advocate for the compliance of Title IX." (Tr. at 23:3-28:25, D. Madsen.) CFE works toward this goal by distributing a "parental tool kit" for parents and students to learn about Title IX, and by speaking to groups throughout Michigan. (*Id.* at 25:14-20, 26:14-27:2; Trial Exhibit (Tr. Exh.) 51 (CFE Tool Kit: "A Parental Guide to Title IX and Gender Equity in High School Athletics").) In addition, CFE advocates its position with various parties, including the MHSAA, to whom CFE complained about the current scheduling of seasons for girls, including sending CFE's position papers and examples of harms that CFE feels result for girls under the status quo. (*See* Tr. Exhs. 57-59.)

Plaintiff Jay-Roberts Eveland has filed suit on behalf of her daughters, Kele and Breanna, who were both minors at the time this lawsuit was filed. (Tr. at 372:19-22, Kele Eveland Testimony; Tr. at 633:14-17, Breanna Eveland Testimony; Stip. Fact No. 30.) Ms. Eveland is also vice-president of CFE. (Tr. at 24:9-15, D. Madsen.) The Eveland daughters have participated or currently participate in high school sports at East Kentwood High School, a MHSAA member school. (Stip. Fact No. 15.) Kele, currently attending Georgia Tech University on an athletic scholarship for volleyball, played volleyball and basketball in high school. (Tr. at 374:17-21, K. Eveland.) Breanna, currently a senior at East Kentwood High School, plays basketball and volleyball and runs track. (Tr. at 634:15-23, B. Eveland.)

This lawsuit has been certified as a class action. Madsen, Eveland, and CFE represent a class of all present and

future female students enrolled in MHSAA member schools participating in interscholastic athletics or deterred from participating because of Defendant MHSAA's allegedly discriminatory conduct, and who are adversely affected by that conduct. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 192 F.R.D. 568, 570 (W.D.Mich.1999).

B. Defendant Michigan High School Athletic Association

Defendant Michigan High School Athletic Association (MHSAA) acts as the governing body for interscholastic sports in the State of Michigan. The MHSAA is an incorporated membership organization. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) Its Articles of Incorporation describe the MHSAA's purpose as follows:

> To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of the high school curriculums, the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof.

(Tr. Exh. 28; Stip. Fact 1.)

The MHSAA membership is comprised of over 700 Michigan high schools, over 80 percent of which are public. (Tr. Exh. 9(a) at 13 (2000-01 MHSAA Handbook); MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 5 (served 7/28/99).) Put another way, all of Michigan's public high schools with qualifying interscholastic athletic programs, with the exception of

some charter schools, are MHSAA members. (*Compare* Tr. Exh. 12 (1999-00 MHSAA Member School Directory) *with* Tr. Exh. 26 (Michigan Department of Education's list of public high schools).) Nearly all of MHSAA's member schools are recipients of Federal financial assistance. (*Compare* Tr. Exh. 12 *with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." (Tr. Exh. 116 at 3 (1978-79 MHSAA Handbook Foreword).) Historically, the interscholastic athletic programs of all Michigan public schools were supervised and controlled by either the Michigan Superintendent for Public Instruction or by the State Board of Education. *See* School Code of 1955, 1955 P.A. 269, § 784; Mich. Comp. Laws § 388.1014 (2001). The MHSAA was housed within the Michigan Department of Education, and its Executive Director was known as the "State Director of Athletics." (Tr. Exhs.115, 117.) The MHSAA's handbook, rules, and regulations were part of the Administrative Code of the State of Michigan. (Tr. Exh. 118.)

In 1972, the Michigan Legislature amended the School Code to move the authority for interscholastic athletics from the State Board of Education to the boards of individual school districts, permitting the districts to join the MHSAA as long as a representative of the State was a member of the MHSAA's governing body. 1972 P.A. 2, § 379 (repealed 1976); Mich. Comp. Laws § 380.1289 (1976) (amended 1995). Also, the Michigan Legislature designated the MHSAA as the "official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and [decreed that it] shall be responsible for the adoption and enforcement of rules relating to eligibility of athletes in schools for participation in interschool athletic events, contests and tournaments." *Id.*

The MHSAA incorporated itself in 1972 "to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with educational values of the high school curriculum." (Tr. Exh. 28 at 2 (Articles of Incorporation); Stip. Fact No. 1.) Membership in the MHSAA is open to all secondary schools in Michigan. (Tr. Exh. 9(a) at 15 (2000-01 MHSAA Handbook, Constitution, art. II, § 1).) To join the MHSAA, a school's board of education must agree to adopt MHSAA rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." (*Id.* at 15 (Constitution, art. II, § 2).) Membership may be denied or delayed to schools who engage in "practices and behaviors ... that are in opposition to [MHSAA's] regulations and principles for interscholastic athletics." (*Id.* at 14 ("How to Join the MHSAA").)

In 1995, the Michigan Legislature amended the School Code again, removing the MHSAA's official designation, but confirming that school districts were still authorized to "join organizations [such as the MHSAA] as part of performing the functions of the school district." Mich. Comp. Laws § 380.11a(4) (2001). The 1995 amendment resulted in no substantive changes in the structure or operation of the MHSAA or in its relationships with its member schools.

The MHSAA regulates interscholastic athletic competition between member schools and sets standards for school membership and eligibility of students to participate in interscholastic athletics. For example, the MHSAA has adopted playing rules and regulations for each MHSAA-sanctioned sport. (Tr. Exh. 9(a) at 50 (Regulation II, § 8).) These regulations "apply in sub-varsity, as well as varsity, interscholastic scrimmage as well as games, and regular season as well as MHSAA tournaments." (*Id.* at 26; Tr. Exh. 14 at 7 (1999-00 MHSAA Coaches Guidebook, p. 5) ("Schools shall adhere to the playing rules adopted by the MHSAA to govern games and meets in baseball, basketball, competitive cheer, cross country, football, golf, gymnastics,

ice hockey, soccer, softball, skiing, swimming and diving, tennis, track and field, volleyball and wrestling.").) Further, the MHSAA must approve any meet or tournament held in Michigan involving three or more teams sponsored by a nonmember school, and if such an event is approved, it must be conducted pursuant to MHSAA rules. (Tr. Exh. 9(a) at 47-48 (Regulation II, § 5(A) and Interpretation No. 157).)

MHSAA rules state that any person coaching an interscholastic team "SHOULD be a member of the regular teaching staff or the school district." (Tr. Exh. 9(a) at 46 (Regulation II, § 3) (capitalization in original).) Non-faculty member coaches must register with the MHSAA prior to assuming any coaching duties. (*Id.*; Tr. Exh. 21(f) (MHSAA Non-Faculty Coach Registration Form).)

In all MHSAA-sanctioned sports except tennis and golf, the MHSAA requires its member schools to use only MHSAA-registered game officials to officiate athletic contests in which teams from those schools participate. (Tr. Exh. 9(a) at 49 (Regulation II, § 7).) To register as an official, a person must complete an application form indicating which sports he or she will officiate, pass a written examination on MHSAA rules and regulations, and pay a registration fee to the MHSAA. (Tr. Exh. 20(a) (MHSAA memorandum to "Prospective MHSAA Officials"); Tr. Exh. 20(b) (MHSAA Officials Registration Application).)

The MHSAA limits participation in interscholastic athletics to "eligible" students. (Tr. Exh. 9(a) at 46 (Regulation II, § 1).) To be eligible to play, a student must, among other things, be younger than age 19, have passed at least four full credit courses during the previous semester, be currently passing four full credit courses, and have passed a physical examination. (*See id.* at 27-45 (Regulation I—"Essential Eligibility Requirements for Senior High School Students"); Tr. Exh. 18 (MHSAA pamphlet summarizing eligibility rules).)

Member schools who violate any of the MHSAA's rules are subject to a wide range of penalties, including censure,

probation, bans from regular season competition and MHSAA tournaments, forfeiture, and expulsion. (Tr. Exh. 9(a) at 78 (Regulation V, § 4).) MHSAA has adopted a "due process procedure" for investigating alleged violations and assessing penalties, which includes adequate notice to the party being investigated, written findings, and the right of appeal. (*Id.* at 21-23 (Due Process Procedure).) MHSAA actively enforces its rules and regulations. (MHSAA's Answers to Plaintiffs' Second Request for Admissions, Response No. 37 (served 7/29/99).)

"[G]eneral control of interscholastic athletic policies" is vested in the Representative Council, according to the MHSAA's Constitution. (Tr. Exh. 9(a) at 18 (Constitution, art. VI, § 1).) The Council is composed of nineteen voting members, of which fourteen individuals are elected by member schools, four individuals are appointed by the Representative Council, and one is a representative of the state superintendent of education. (*Id.* at 15 (Constitution, art. IV, § 1).) Except for the state representative, membership in the Representative Council is limited to faculty and board of education members of each member school. (Tr. Exh. 9(a) at 16.) Council members must resign their positions if they end their position at member schools. (Tr. Exh. 9(a) at 13, 15-17.)

The fourteen elected members of the Representative Council are elected by vote of the member schools. (Tr. Exh. 9(a) at 13.) In 2000-01, seventeen of the nineteen members of the MHSAA Representative Council were employees or representatives of public schools or school districts. (*See* Tr. Exh. 9(a) at 6-7 *compared with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA has an Executive Committee, comprised of five Representative Council members, three elected officers and two members appointed by the president. (Stip. Fact 6.) One of the Executive Committee's powers is to "[m]ake all rules necessary for the effective control and government of interschool activities consonant with the legislation

enacted by the Representative Council and with this Constitution ...." (Tr. Exh. 9(a) at 18.)

The Executive Director of the MHSAA is "the executive officer in control of Senior High School and Junior High/Middle School interscholastic athletics." (Tr. Exh. 9(a) at 19.) The Executive Director is also responsible for investigating, deciding, and penalizing violations of the MHSAA's rules and regulations. (*Id.*) Decisions of the Executive Director are "subject to review by the Executive Committee and/or the Representative Council, upon appeal by the Administration of the Member School or Schools involved." (*Id.*)

Most of the MHSAA's revenue is derived from state championship tournaments. Approximately 86 percent of the MHSAA's budget comes from the sale of tickets to its tournament events. (Tr. Exh. 16 at 2 (Flyer-"This is the MHSAA").) Member schools remit a substantial portion of the gate receipts from their participation in the state championship tournaments to the MHSAA. (*See* Tr. Exhs. 37(a)-(h) (MHSAA Financial Report Forms from MHSAA Tournaments).) For example, in 1997, Rockford High School hosted a regional football playoff which grossed $14,948 in admissions; $12,208 (82 percent) was remitted to the MHSAA. (Tr. Exh. 37(a).) The remainder of the MHSAA's revenue comes from tournament concessions, fees for the registration of officials, advertising in tournament programs, corporate sponsorship, and royalties from radio and television broadcasts of MHSAA tournament events. (Tr. Exhs.35-37.)

The MHSAA issues broadcast policies on radio and television coverage for both regular season and post-season tournaments. "The Representative Council ... passed a regulation effective August 1, 1989, prohibiting live television originations of regular-season athletic events involving member schools." (Tr. Exh. 21(a) at 3.) MHSAA rules also state that "[n]o school may televise live—or may grant on a complimentary or fee basis to either a profit or

nonprofit entity the rights to televise live on commercial, subscription or independent stations or networks—any interscholastic event in which any MHSAA member school is a participant in any MHSAA Tournament sport." (Tr. Exh. 9(a) at 59 (Regulation II, Section 14(B)).) Schools participating in broadcast events do not receive any portion of the broadcast royalties. (Tr. Ex. 20(a)). Finally, member schools host many of the tournament games and provide employees to manage those game sites. (*See* MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 7 (served July 28, 1999).)

Until January 1, 1988, MHSAA employees with state teaching certificates were considered state employees eligible to participate in the state retirement system. Mich. Comp. Laws § 38.1347(1) (1987). Employees who began with the MHSAA before that date still have membership in the state employees' retirement system. Mich. Comp. Laws § 38.1347(1)-(2) (2001).

The Representative Council appoints committees which make recommendations to the Council on seasons and other issues, recommendations which are rejected or approved by the Council. (*Id.* at 944:13-945:1.) Further, as a condition of membership, schools are obligated to follow all of the MHSAA rules; put simply, "it's a take it or leave it proposition." (Tr. at 867:11-15, K. McGee.)

Many member schools belong to leagues or conferences which also regulate interscholastic athletics to some degree. (Tr. at 785:16-788:5, K. McGee.) But all conference rules must comply with MHSAA rules, since the schools are also MHSAA members. (*Id.* at 863:14-864:1; Tr. at 164:4-10, L. Kostreva; Tr. Exh. 222, at 2, 6-9.) The Big Nine Athletic Conference Constitution, for example, prescribes that "failure to join MHSAA will result in automatic exclusion from membership in the league." (Tr. Exh. 222 at 6 (Big Nine Athletic Conference Constitution).)

The MHSAA determines when seasons occur. The MHSAA prescribes when practice may begin, when

competition may begin, when competition must end, and the maximum number of games that may be played. (Tr. Exh. 9(a) at 54-55 (Regulation II, § 11(A)).) Member schools are prohibited from practicing outside of the dates set by the MHSAA calendar. (Tr. Exh. 9(a), at 54-61, 109-110; Tr. Exhs. 63, 83.) Member schools may not participate in any competition beyond the end of the MHSAA season or state championship tournament in any sport. (*Id.* at 59 (Regulation II, § 12).) For example, for the 2000-01 school year, the MHSAA prohibited girls' basketball teams from practicing before the week of August 15, limited teams to 20 games and four scrimmages for the season, and required teams "to terminate practice and competition on or before the final date of the MHSAA sponsored ... tournament." (Tr. Exh. 9(a) at 54-55 (Regulation II, §§ 11(A), 11(B), and 12).)

Schools, with the assistance of conferences and leagues if they are a part of one, set only the practice schedule and game dates within a season. In addition, MHSAA rules prohibit member school athletes from participating in both interscholastic sports and amateur club sports in the same sport in the same season. (Tr. Exh. 14, at 4; Tr. Exh. 9(a) at 43-44.)

The MHSAA also limits the scope of permissible activities "outside of the MHSAA-defined season for a sport." (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)).) Sports activities during that time cannot use school transportation, school uniforms, or school district funds; hold mandatory practices or games; or involve more than three players from the same school team if the coach is also present. (*Id.*)

The MHSAA sponsors state championship tournaments in twelve boys' sports and twelve girls' sports. (Tr. Exh. 16 at 3 (Flyer—"This is the MHSAA").) These state-wide tournaments are open only to MHSAA member schools who comply with MHSAA's rules and regulations. (Stip. Fact No. 14; MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 12 (served July 28, 1999); Tr.

Exh. 9(a) at 76 (Regulation V).) "[O]nly those teams playing a sport during a current season will be eligible to enter the MHSAA meet or tournament in that sport. For example: Girls golf teams playing in the fall season will not be eligible to enter the Girls Regional Golf Tournament in the spring." (Tr. Exh. 9(a) at 60 (Regulation II, § 15, Interpretation No. 214).)

The very nature of interscholastic athletics necessitates a controlling entity like the MHSAA. (Tr. Exhs.22, 115.) The structure provided by the MHSAA as Michigan's governing body is necessary for appropriate organization of interscholastic athletics. "[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14, Kathleen McGee Testimony; Tr. Exh. 22 at 3 (MHSAA document explaining that in contrast to non-athletic activities such as music and drama, central control and a "statewide regulatory body" is necessary to the success of interscholastic athletics).) Indeed, 90 percent of high schools in the state of Michigan and 60 percent of the junior high/middle schools are members of MHSAA. (Tr. Exh. 16 at 2.)

II. THE SCHEDULING HISTORY OF GIRLS' SPORTS

John Roberts, the MHSAA's current executive director, has written, "Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program. While this allowed for the best use of facilities, faculty and officials, it also led to an imbalance of girls' athletic opportunities across the three seasons of the school year." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).)

Until the early 1970s, before it was an MHSAA-sanctioned sport, girls played high school basketball in the winter at the same time boys' teams played. (Tr. at 576:1-

15, 577:20-25, Catherine Dritsas[4] Testimony.) In December 1970, the MHSAA received requests from certain schools for permission to start girls' basketball practice "before the established winter starting dates," to run girls' basketball in fall. (Tr. Exh. 33 at 2 ("Girls Basketball in Michigan," Sept. 1983 MHSAA Bulletin).) The reasons given for the request included "better use of the physical plants." (*Id.*; Tr. at 578:1-8, C. Dritsas.) After a hearing held on October 11, 1971 to discuss the topic, it was recommended that a rule permitting competition in girls' basketball at any time during the school year be adopted. (Tr. Exh. 33 at 2.) There is no indication whether this rule was adopted. (*See id.*) Presumably the rule was adopted, however, since an unknown number of girls' teams may have also been playing in the fall at some point before the MHSAA sponsored a tournament for girls' basketball. (*Cf.* Tr. at 772:6-10, K. McGee.)

The MHSAA held the first MHSAA girls' basketball tournament in fall 1973. (Tr. Exh. 27 at 6 (1972-73 MHSAA Bulletin, vol. XLLX [sic], at 422).) Surveys were submitted to schools to determine when they wanted the tournament held. (Tr. Exh. 33 at 2.) In 1976, the MHSAA's Girls' Basketball Committee recommended that the "Girls Basketball season move to the Winter and Girls Volleyball be played in the fall." (Tr. Exh. 78 at 1 (Minutes of 5/22/76 Girls Basketball Committee Meeting).)

The following year, the MHSAA merged the Girls' Basketball Committee into a single committee of boys' and girls' basketball coaches. (Tr. Exh. 78 at 3 (Minutes of 5/5/77 Basketball Coaches Committee Meeting).) By a vote of 11-2, the newly-constituted Basketball Coaches Committee voted

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[4] Ms. Dritsas coached girls' basketball at the Academy of Sacred Heart in the Detroit area from 1969 to 1997. (Tr. at 575:1-5, C. Dritsas.) She was inducted into the Michigan High School Coaches Hall of Fame in 1993. (*Id.* at 575:13-17.) She was called to testify by the United States.

to keep boys' basketball in the winter and girls' basketball in the fall. (*Id.*)

Some schools attempted to continue playing girls' basketball in the winter. (Tr. at 580:5-14, C. Dritsas.) Within a couple of years, however, these schools had to move girls' basketball to the fall because they "didn't have anybody to compete against and the girls were denied the opportunity of any state tournament competition." (*Id.*)

The MHSAA noted in 1983, in "Girls Basketball in Michigan," that "[i]t is alleged that girls and boys are not treated equally because of the split seasons; but it is quite obvious, based on the surveys, that school administrators believe a split season in boys and girls basketball is the very best way to meet the needs of interscholastic athletic competition for both boys and girls." (Tr. Exh. 33 at 2.)

Prior to 1971-72, the MHSAA scheduled boys' golf in the spring. The MHSAA moved the boys' season to the fall to obtain "the use of better courses on Saturdays." (Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 5)). In 1976, the Representative Council decided to conduct the girls' tournament on Mondays instead of Saturdays "since Saturdays are days in which it is extremely difficult to acquire courses for participation." (Tr. Exh. 10(b) at 3 (1976 MHSAA Bulletin, at 6).) The following year, the Sports Season Committee reconsidered recommending to the Representative Council that it switch girls' golf from the spring to the fall, but the vote was defeated within the committee by a narrow margin. (Tr. Exh. 87 (5/4/77 Sports Season Committee Meeting Minutes at 16).)

In 1981, the Representative Council decided to schedule boys' and girls' soccer together in the fall, "based on the survey of schools, as well as the financial advantage to schools in conducting the sport during the same season for boys and girls." (Tr. Exh. 47 at 3 (Minutes of 12/9/81 Representative Council Meeting at 393).) In fact, sixty member schools voted for separate seasons for the sexes in soccer, but eighteen schools voted for a combined season.

(Tr. Exh. 229 (1981 Survey—Soccer).) However, most schools (507) expressed no preference, and many apparently did not vote. (*Id.*) After being asked by several school administrators to reconsider its decision, the Representative Council "determined that, beginning with the 1982-83 school year, a Boys Soccer Tournament would be scheduled in the fall and a Girls Soccer Tournament would be scheduled for the spring." (Tr. Exh. 10(d) at 5 (Minutes of 3/28/82 Representative Council Meeting).)

In May 1990, the MHSAA recognized that girls' participation opportunities in the winter season were lacking. "[G]irls' athletic opportunities in the winter are in almost every Michigan high school, inadequate compared to boys' opportunities in the winter and girls' opportunities in the fall and spring." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) Consequently, the MHSAA took the "first step" to remedy this inequity "by changing Lower Peninsula girls swimming and diving from the fall season to the winter." (*Id.*) Thirteen years earlier, in 1977, the MHSAA's Sports Season Committee had recommended to the Representative Council that it "change the girls swimming season to coincide with the boys season in the winter." (Tr. Exh. 87 at 1 (5/4/77 Sports Season Committee Minutes).)

In November 1990, the MHSAA reversed the decision to move girls' swimming and diving to the winter and decided to study, among other things, "the most opportune placement of the girls and boys swimming seasons in the Lower Peninsula" and "the most opportune placement of other sports currently regulated by MHSAA (volleyball, basketball and golf for girls and soccer for boys are frequently discussed)." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) This reversal was due to opposition, at least in part, by fifty schools and the Michigan Interscholastic Swim Coaches Association (MISCA). (Tr. Exh. 45 at 236; Tr. at 1196:2-24, Greg Phill Testimony.)

Following its reversal, the Representative Council "reaffirmed the need to continue discussing sports seasons." (Tr. Exh. 95 at 9-11 (4/23/91 Memorandum Regarding "Pro-Active Approach to Expanding Athletic Opportunities for Girls in the Winter Season").) This discussion led to a proposal that the MHSAA move "slowly and deliberately to examine the placement of several existing programs" while at the same time considering whether to sponsor new winter activities for girls. (*Id.*)

The MHSAA was aware that it could be held legally liable if girls' sports seasons were found legally inequitable. The proposal to study seasons was "made mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." (Tr. Exh. 95 at 9.)

Of the three winter activities that it considered, bowling, indoor track and competitive cheerleading, MHSAA decided to adopt cheerleading for girls in 1994. (Tr. Exh. 95 at 10; Tr. Exh. 9(a) at 26; Tr. Exh. 98.)[5] With respect to moving existing seasons, the Representative Council was informed by the author of an MHSAA document that "it is important for the long term that the MHSAA conduct without fanfare a comprehensive study of sports seasons," including (1) "switching girls and boys Lower Peninsula swimming seasons by the year 2000;" (2) "combining boys and girls golf into a single coed program by the year 2000 (and possibly doing the same for tennis);" and (3) "switching girls

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[5] John Roberts, MHSAA Executive Director, said in his column "Sports and Their Seasons" in a 1990-91 MHSAA Bulletin, "No one sport can solve all the historical inequities, and no sport can be above consideration as a part of the future solution. Cheerleading cannot be considered in the solution. While cheerleading is certainly a part of the total experience available to boys and girls in the winter, merely defining cheerleading as a sport and counting it toward athletic opportunities for girls in the winter does not satisfy Federal regulations when analyzing opportunities for boys vs. girls in interscholastic sports." (Tr. Exh. 81.)

volleyball and basketball seasons by the year 2000." (Tr. Exh. 95 at 11.)

That memo, of April 23, 1991, also "proposed that the Representative Council give the directive to the MHSAA staff in May *to work quietly but steadily through the state's athletic and educational communities for however long is necessary to find and/or forge consensus regarding these and other ideas.*" (*Id.* (unclear whether emphasis in original).) There is no evidence that the MHSAA studied the sports season issue as recommended, and MHSAA has implemented none of the proposed changes detailed above.

Finally, the MHSAA does not currently sponsor boys' volleyball. But the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

III. SPORT-SPECIFIC FACTS

A. Girls' Basketball

The Court determines that there are a number of specific disadvantages to playing basketball in the fall. After hearing the evidence, the only potential advantage is the possibility that the opportunity for recruitment to play collegiate basketball may be increased because college women's coaches may be able to see teams that play in the fall more often and with fewer NCAA recruiting restrictions. However, the MHSAA did not offer any evidence to prove that this translated into more scholarships or spots on collegiate basketball teams than Michigan girls would otherwise receive.

Regardless, moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players. Moreover, there is only circumstantial evidence that Michigan girls playing in the winter would not

be recruited at the same level that the MHSAA asserts that they are in fall. Finally, the Court finds that girls were originally scheduled to play basketball in the fall to avoid inconveniencing the boys' basketball team, and that kind of historical stigma should be erased.

1. General Disadvantages to Playing in Fall

In 1999-2000, 19,760 girls played basketball for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the girls' basketball state championship tournament in the fall. (Stip. Fact No. 41.) For 2001-02, the MHSAA set the first practice date for August 13, the first contest date for August 27, and the end of the season as December 1. (Tr. Exh. 9(a) at 113.) This places the girls' basketball season in the fall. Forty-eight states schedule girls' basketball in the winter. (Tr. Exh. 256.)[6] The National Collegiate Athletic Association (NCAA) also schedules college women's basketball in the winter. (Tr. Exh. 40 at 2.)[7]

The MHSAA schedules the boys' basketball state championship tournament in the winter. (Tr. Exh. 9(a) at 113). For 2001-02, the MHSAA set the first practice date

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[6] Until recently, 44 states scheduled girls' volleyball in the fall and girls' basketball in the winter. As a result of litigation, three additional states will also be switching seasons to this format. *Pederson v. South Dakota High Sch. Athletic Ass'n*, No. 00-4113 (D.S.D.) (consent decree); *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D.Va.1997) (settlement agreement following jury verdict in plaintiffs' favor); *Ries v. Montana High Sch. Ass'n*, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000). A fourth state, North Dakota, has voluntarily agreed to switch the seasons. Jane Bos, *Michigan Soon Will Stand Alone; Four States Moving Girls Hoops to Winter*, The Grand Rapids Press, Aug. 26, 2001, at D10, *available at* 2001 WL 25385084 (reporting on North Dakota).

[7] As explained earlier, the traditional playing season for a sport is one hallmark that the season is an advantageous time to play the sport, but tradition is not dispositive. In the same manner, the season in which the NCAA sponsors a particular sport is a hallmark of a traditional, and thus advantageous, season, but it is only one, non-dispositive factor.

for boys as November 12, the first contest date for December 3, and the end of the season as March 23. (*Id.*) Winter is the season when high schools in the rest of the country play boys' basketball and when the NCAA schedules men's basketball. (Tr. Exh. 256; Tr. Exh. 40 at 2.) The traditional playing season for basketball is the winter. (Tr. at 497:1-4, D. Lopiano).[8]

Plaintiffs presented very credible evidence that the MHSAA's scheduling of girls' basketball in the fall disadvantages girls in several ways. Because Michigan girls play basketball in the fall season, they cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game, that take place during the traditional winter season. (Tr. at 99:8-100:8, Kristi Madsen Testimony.) Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments. (Tr. at 98:1-23, Kristi Madsen[9]; Tr. at 114:20-115:21, Kelsey Madsen.[10])

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[8] Dr. Lopiano is executive director of the Women's Sports Foundation, whose mission is to expand and enhance opportunities for girls and women to participate in sports and leadership opportunities. (*Id.* at 485:1-11.) Dr. Lopiano, who testified as an expert witness for Plaintiffs, has a Ph.D. in athletic administration with a subspecialization in gender equity in sport. (*Id.* at 490:7-10.) She served as director of women's athletics at the University of Texas, and served on the NCAA committee that produced the first gender equity study for the NCAA. (*Id.* at 491:13-492:3.) At MHSAA's invitation, she has also spoken at MHSAA's Women in Sports Leadership Conference. (*Id.* at 492:4-13.) Further, she provided input in the drafting of the U.S. Department of Education's athletics regulations promulgated under Title IX. (*Id.* at 493:24-494:7.)

[9] Kristi Madsen testified for Plaintiffs. (Tr. at 90:1-4, Kristi Madsen.) Among the many sports she played at various points in high school, Ms. Madsen played four years of both volleyball and softball and three years of basketball. (*Id.* at 90:15-91:14.)

[10] Kelsey Madsen, a Northview High School junior, testified for Plaintiffs. She played basketball, volleyball and softball her first two

"March Madness" is the season of the year when basketball is the featured sporting event in the news media because of NCAA tournaments, and a number of promotional events promote basketball and basketball players. Kelsey Madsen testified that "for boys' basketball, it means tournaments and publicity for it and everyone is watching boys' basketball. It's a big hype for the season." (Tr. at 114:23-25, Kelsey Madsen.) High school girls' basketball in Michigan cannot similarly capitalize on the excitement that "March Madness" promotions create in the general public because they are not playing in March. Kelsey Madsen said, "I would love [playing girls' basketball during 'March Madness.'"] It would be awesome, just to know that you're part of something like that, to have an opportunity to play and be known in the season as like 'March Madness.' It's just everyone knows what it is. It would be good." (*Id.* at 115:16-21.) Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'" (*Id.* at 98:19-23.) Moreover, attention is on the sport of football and the state football tournament in the fall, which is when girls play basketball. (*Id.* at 99:1-7, Kristi Madsen.)

Because Michigan girls do not play basketball in the winter and because Friday nights are dedicated to boys' football in the fall, girls often must play basketball during school nights on Tuesdays and Thursdays. (Tr. at 29:18-32:6, D. Madsen; Tr. at 93:16-94:9, Kristi Madsen (testifying that she and her teammates "had to bring homework to do at the games or on the bus because we had school the next day on both Tuesday and Thursday nights").) On the other hand, Michigan boys are able to play basketball on Tuesday and

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years of high school, and planned to play volleyball and softball her junior year. (Tr. at 111:3-20, Kelsey Madsen.)

Friday nights in the winter. If the girls played basketball during the traditional winter basketball season like the boys, girls would also have the opportunity to play games on Tuesday and Friday nights. (Tr. at 94:2-9, Kristi Madsen; Tr. at 518:1-7, D. Lopiano.)

Moreover, Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season. (Tr. at 501:17-502:2, D. Lopiano.) Dr. Linda Bunker[11] testified that Parade All-American team selections for high school basketball players are made in March. She further testified that "[i]f you play your high school basketball season in the fall, you're not even really eligible to be considered. I mean, you can be legally considered, but everybody's forgotten about you. It's a tremendous disadvantage." (Tr. at 706:1-6, Linda Bunker Testimony.) Not being able to participate in national team rankings and All-American honors "affects [Michigan girls'] visibility to recruiters in terms of college athletic scholarship opportunities." (Tr. at 501:25-502:2, D. Lopiano.) Ms. McGee counters that Michigan girls still can be and are nationally ranked in rankings like the USA Today National Poll and Parade All-American Team. (Tr. at 878:16-21, K. McGee.[12]) The MHSAA did not, however, provide any

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[11] Dr. Linda Bunker has a Ph.D. in kinesiology and sports psychology and is a tenured professor at the University of Virginia. (Tr. at 651:9-10, L. Bunker.) She was an expert witness for Plaintiffs. Dr. Bunker's research and scholarship focuses on the psychological aspects of sport and the way in which sport contributes to the lives of young boys and girls and men and women in contemporary society. (*Id.* at 651:14-18.) Besides being a member of several prominent professional sport psychology associations, Dr. Bunker has also received several distinguished awards. (*Id.* at 662:18-663:5.)

[12] Ms. McGee is athletic director and head girls' basketball coach at Flint Powers Catholic High School. (Tr. at 768:11-14, K. McGee.) She testified on behalf of the MHSAA. She has coached girls' basketball for twenty-nine years and been an athletic administrator for nine years. (*Id.* at 769:2-6.)

evidence that suggested that the ability to be ranked was not influenced by the fall playing season.

Girls also lose opportunities to participate in national shoot-outs such as the Nike and Blue Star shoot-outs. These shoot-outs occur in the fall when girls are participating in their high school basketball seasons. In fall 2001, there were eighteen Blue Star shoot-outs between September 16 and October 21 that Michigan girls could not attend because of the scheduling of their high school seasons in the fall. (Tr. at 911:18-913:5, S. Guevara.)

The boys' high school basketball season is approximately three weeks longer than the girls' season, giving boys a greater opportunity to practice and play. (Tr. at 499:23-500:5, D. Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).) Michigan girls, unlike Michigan boys, cannot compete against teams in neighboring states because girls in those states play basketball in the traditional winter season. (Tr. at 503:10-18, D. Lopiano; Tr. at 175:12-22, L. Kostreva (testifying that Menominee boys play basketball against Wisconsin high schools during the MHSAA regular season).) Playing against teams in neighboring states can also lessen travel burdens. (*See id.* at 171:25-172:8, 175:12-22, 198:7-14 (testifying that Menominee boys need only travel five minutes to play certain Wisconsin schools whereas girls must travel an average of 90 minutes to play other Michigan schools).)

2. Recruiting

The testimony regarding the effect that the placement of the girls' basketball season in the fall has on college athletic recruitment opportunities conflicted. The MHSAA argued that Michigan girls have special advantages in being recruited to play on collegiate teams by playing high school basketball in the fall, which are discussed *infra*. Even if this were true, however, it is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on "equal footing" with Michigan boys and with girls in the rest of the country with respect to

collegiate recruiting. (Tr. at 851:21-852:4, K. McGee; Tr. at 910:12-16, Sue Guevara Testimony).

Ms. McGee testified that "it's very easy to get [the] kids [she coaches] evaluated in the fall." (Tr. at 795:9-14, K. McGee.) While the Court places a good deal of weight on Ms. McGee's impression given her experience in coaching girls' basketball, her testimony must also be considered in light of Flint Powers' status as "one of the most successful" girls' basketball teams in Michigan whose "experiences [might be] different from the run-of-the-mill programs in the state." (*Id.* at 825:14-23.)

Another MHSAA witness on this issue, head University of Michigan (U of M) women's basketball coach Sue Guevara, testified that recruiting in basketball begins long before an athlete's senior year and can, in some cases, start as early as before the ninth grade. (Tr. at 887:19-888:6, 899:17-900:1, S. Guevara.) Ms. Guevara testified that she sees many other women's basketball coaches from around the country, including from prestigious women's basketball programs, at the top girls' games in Michigan, since before the beginning of October, attending high school games does not count against the forty "contact" limit placed on coaches by the NCAA.[13] (Tr. at 886:7-17, S. Guevara.) In addition, it is more convenient for college coaches to attend high school games during this time since the women's college practices have not started yet. (Tr. at 886:22-887:1, S. Guevara). Ms. Guevara indicated that these factors result in more visibility for Michigan's girls to be recruited, and that she believed that she and her staff would not have the same opportunities to watch and evaluate Michigan girls if they

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[13] For purposes of recruiting for collegiate basketball, a "contact period" is when a college coach may contact the athlete and her parents, and coaches are allowed three of those contacts after the period begins. (Tr. at 888:17-19, S. Guevara.) An "evaluation" is when the coach watches the athlete play or asks the athlete's high school for the athlete's transcript. (*Id.* at 888:20-24.)

play in the winter season. (*Cf.* Tr. 885:18-20; 891:17-892:19, S. Guevara.)[14]

On the other hand, Plaintiffs point out that to the extent that college basketball recruiting occurs at club tournaments in the fall, Michigan girls cannot play at such tournaments, and therefore cannot be seen by out-of-state recruiters at those events. (Tr. at 911:18-913:5, S. Guevara (testifying that 18 Blue Chip tournaments occur in the fall at which she evaluates and recruits players).) Ms. Guevara's response to Michigan girls' inability to attend these fall tournaments was that "they don't need to." (*Id.* at 913:3-5.) Michigan college coaches are also still able to attend summer AAU basketball tournaments, where every women's college

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[14] Ms. Guevara also testified that of the forty evaluation days given to women's basketball programs, U of M's program has used between twenty and twenty-five of its annual evaluation days on Michigan girls. (Tr. at 891:5-16, S. Guevara.) It is unclear to the Court, however, whether that number of days would still be used on Michigan girls if the season of play was switched to winter, since U of M women's basketball would obviously continue to use all forty allowed days to evaluate players. The change to winter would not necessarily mean that fewer days than are used now would go to Michigan girls, since they would be playing at the same time that almost every other girls' team in the nation is. Presumably, U of M also has some level of commitment to recruiting Michigan girls since U of M is a public university. But the Court is clear on Ms. Guevara's general point that she believes that Michigan girls would not be at the same recruiting advantage by playing in the winter.

The MHSAA also provided circumstantial evidence of its recruiting advantages argument by asserting that fifteen female recipients of the Miss Basketball title, given to the top player in the state annually, have played collegiate basketball at out-of-state colleges and universities, whereas only six Mr. Basketballs have done so. (Tr. at 777:4-778:6, K. McGee; Tr. Exh. 285.) The Court places very limited weight on this evidence, and certainly much, much less weight than the testimony of Ms. Guevara. These lists of where the single best player in Michigan was recruited do not prove that recruitment is increased for girls playing in the fall, but is only weak circumstantial evidence of that conclusion. If recruitment were increased, the list does not explain if the fall season alone is the reason or if other factors are present, to what extent all other female basketball players in Michigan are recruited besides the single best player, or what effect moving the season to the winter would have.

basketball program is in attendance. (Tr. at 905:9-14, 909:4-7, S. Guevara.)

Plaintiffs also argued that if Michigan girls played in the winter, college coaches would still be able to recruit them just as they recruit girls outside of Michigan. For example, the University of Michigan's women's basketball team plays on Thursdays and Sundays in the winter. (Tr. at 892:1-8, S. Guevara.) If Michigan girls played in the winter on Tuesdays and Fridays—as Michigan boys do—U of M's coaching staff would be able to attend Michigan girls' high school games on those days, even if they conflict with U of M's practice times.

NCAA recruiting restrictions prevent college coaches from watching and evaluating basketball players during "quiet periods" and "dead periods," as defined in the NCAA Manual. (Tr. Exhs.5, 7, 65-66.) During the winter season, however, the NCAA does not set any quiet periods. Instead, the "evaluation period," when players can be observed off-campus, runs October 8-February 28, and the "contact period," when off-campus, in-person recruiting contacts can be made, runs March 1-26. (Tr. Exh. 5 at 3-4; Tr. Exh. 7 at 9.)[15] Thus, the period when recruiters can observe high school players runs through the fall and winter seasons. The period when recruiters can contact players off-campus is during the winter season.

Plaintiffs also argue that Michigan girls face some recruiting restrictions because of the fall basketball season. In 2001-02, for Division I schools, the NCAA has set "quiet periods" when in-person recruiting contacts are limited to campus visits, for August 1-September 8 and September 30-October 7. (Tr. Exh. 5 at 3-4 (Excerpts from 1999-00 NCAA Recruiting Manual, pages 88-89); Tr. Exh. 7 at 9 (2001-02

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[15] The NCAA limits Division I colleges to forty evaluation days during the evaluation period and sixteen contact days during the contact period. Those days not designated by the college as an evaluation day or contact day are treated as quiet period days. (Tr. Exh. 7 at 9.)

NCAA Guide for the College-Bound Student-Athlete).) The NCAA has also set a "dead period," when no contacts are permitted, for November 12-15. *Id.* In 2001-02, practice and the regular season for Michigan girls began during the first quiet period. (Tr. Exh. 9(a) at 113.) During these quiet periods, Michigan girls are playing high school games, presumably making on-campus visits more difficult.

B. Girls' Volleyball

The Court finds that the MHSAA's scheduling of girls' volleyball in the winter, not a traditional season for girls' volleyball, disadvantages girls in several remarkable ways described in this section. Other scheduling decisions have forced girls' volleyball into a non-traditional season, unlike the other sports with only boys' teams. In volleyball, the non-traditional season is the disadvantageous season for girls.

In 1999-2000, 20,934 girls played volleyball for MHSAA member schools, the largest number of participants in a MHSAA girls' sport. (Tr. Exh. 99 at 42-43 (1999-2000 Athletics Participation Survey).)[16] The MHSAA schedules the volleyball state championship tournament in the winter. (Stip. Fact No. 42.) For 2001-02, the MHSAA set the first practice date as November 15, the first contest date as December 8, and the end of the season as March 16. (Tr. Exh. 9(a) at 113 (2001-02 MHSAA Quick Reference Calendar).) This means that Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. (Tr. at 497:21-498:1, Donna Lopiano.) Forty-eight states play high school girls' volleyball in the fall. (Tr. Exh. 256 (National Federal Sport Season Surveys)).[17] The

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[16] The 1999-2000 participation data is found at the last two pages of Trial Exhibit 99.

[17] As a result of litigation, three states will soon be switching their girls' volleyball to fall and girls' basketball to winter, and one state is

NCAA schedules women's volleyball in the fall. (Tr. at 246:8-9, Bette Norman-Nakamura[18] Testimony.) Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV),[19] rather than the high school programs because of recruiters' ability to see a far larger number of players in a single setting than at a high school contest or tournament. (Tr. at 326:20- 327:6, Charles Erbe[20] Testimony) (testifying that a recruiter can only see twenty-four players at a high school match or 100 players at a high school tournament compared to as many as 5,000 players at a USA Volleyball

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voluntarily doing so, bringing the total to forty-eight states who schedule those girls' sports that way.

[18] Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, is a teacher with Warren Consolidated Schools in the Detroit area, and a past president of the Michigan Interscholastic Volleyball Coaches Association. (Tr. at 200:17-21, 226:5-21, B. Norman-Nakamura.) She has been coaching volleyball at various levels and in various programs since the 1960s. (*Id.* at 202:3-15.)

[19] This was the acronym used by witnesses to refer to this organization.

[20] Mr. Erbe is head women's volleyball coach at Michigan State University and testified on behalf of Plaintiffs. (Tr. at 321:22-23, C. Erbe.) He began his coaching career working with girls' high school programs in California. (*Id.* at 323:4-13.) He founded the United States Junior National Volleyball Program, which provided most of the players to the 1980 and 1984 USA Olympic women's volleyball teams. (*Id.* at 323:24-324:17). He also coached the University of Southern California's women's volleyball team to four national championships. (*Id.* at 324:19-325:10). His teams at Michigan State have perennially finished near the top of the Big 10 Conference standings and participated in the NCAA tournament. (*Id.* at 325:21-326:6.)

tournament held over a two to three-day period). The recruiting that occurs in Michigan during the high school girls' volleyball season is mostly limited to smaller in-state schools. (Tr. at 330:8-21, C. Erbe; Tr. at 383:7-16, K. Eveland; Tr. at 427:5-12, Sharon Schatz[21] Testimony.)

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. (Tr. at 206:3-207:5, B. Norman-Nakamura.) MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season. (*Id.* at 221:21-24; Tr. Exh. 9.)

The most competitive club volleyball programs are sponsored by USAV, the sport's national governing body. (Tr. at 327:3-7, C. Erbe; Tr. at 382:15- 383:3, Kele Eveland; Tr. at 1066:7-10, Phil Wilson[22] Testimony.) Outside of Michigan, the USAV club season for high school age girls begins in early January and continues through early July. (Tr. at 206:8-14, B. Norman-Nakamura.)

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. (Tr. at 328:1-22, C. Erbe.) The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. (Tr. Exh. 9(a) at

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[21] Ms. Schatz is president of the Michigan Junior Volleyball Association and coached women's volleyball at Aquinas College, a National Association of Intercollegiate Athletics (NAIA) school, for 15 years. (Tr. at 411:8-13, S. Schatz). She testified on behalf of Plaintiffs.

[22] Mr. Wilson, a teacher at Kalamazoo Valley Community College and the head volleyball coach at Kalamazoo Central High School, testified on Defendant MHSAA's behalf. (Tr. at 1045:11-17, P. Wilson.) He has coached volleyball at Kalamazoo Central for ten years, and his team won the Class "A" state championship in 1996. (*Id.* at 1047:8-13.)

43 (Regulation I, § 13); Tr. at 453:10-19, Jack Magelssen Testimony.)[23]

By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing, they don't have a power rating, [and] they don't have the ranking that other teams do when they do the [seeding]." (Tr. at 328:4-12, C. Erbe; Tr. at 441:7-15, J. Magelssen.)

Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. (Tr. at 446:4-14, J. Maglessen.)[24] It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments. (*Id.* at 446:15-19.)

Playing high school volleyball in the winter rather than the fall affects Michigan girls' ability to be recruited in two ways. First, they are not seen by college coaches who go to the USAV club tournaments to recruit. (Tr. at 328:23-329:3, C. Erbe; Tr. at 386:3-22, K. Eveland.) Second, they miss out on "the experience of competing against a broad base of competition." (*Id.* at 329:3-14, C. Erbe.) This experience is

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[23] Mr. Magelssen is a teacher and head volleyball coach at Portage Northern High School, where his teams have won ten state championships. (Tr. at 435:6-9, 436:2-9, J. Magelssen.) Mr. Magelssen has been named MHSAA Class A coach of the year ten times, was a finalist for national coach of the year in 1987, and was national coach of the year in 1994. (*Id.* at 439:13-20, 440:2-9.) He has also coached USAV and AAU club volleyball since 1984. (*Id.* at 437:23-438:18.) He testified on behalf of Plaintiffs.

[24] When the Michigan club teams are formed they are essentially new teams because MHSAA rules prohibit more than three players from a single school team from playing for their school coach "outside of the MHSAA-defined season for [that] sport." Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.).

instrumental in forging a player's psychological framework and confidence that she can "compete against anybody at any level." (*Id.*)

Because of the shortened club season for Michigan girls, over a four-year high school career, they will have 16 months less of competitive training and experience compared to girls in the 48 states that play high school volleyball in the fall. (Tr. at 330:22-331:8, C. Erbe.) This shortened experience disadvantages Michigan girls because recruiters are looking for players "with the most experience." (*Id.* at 331:9-19, 441:5-7, J. Magelssen.) This limited experience affects even those girls who are eventually successfully recruited to play in college volleyball programs. (Tr. at 342:1-7, C. Erbe (observing that his Michigan recruits come into college "less confident," "scared," and "afraid to make mistakes" compared to his out-of-state recruits).)

For example, Kele Eveland,[25] an All-State volleyball player as a junior and senior, received only one handwritten letter[26] from smaller Division II schools during the MHSAA volleyball season. (Tr. at 387:18-23, K. Eveland.) Similarly, Breanna Eveland, a first-team All-State volleyball player as a sophomore and junior, has thus far received only one scholarship offer from a small Division I college and was not currently being recruited by any other schools at the time of trial.[27] (Tr. at 635:2-637:7, B. Eveland.)

In addition, the limits placed on the experience gained by Michigan high school female volleyball players as a result

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[25] In addition to her on-the-court success, Ms. Eveland graduated from high school with a 4.0 grade point average and was valedictorian. (Tr. at 378:8-10, Kele Eveland.) At Georgia Tech, Ms. Eveland made the dean's list both semesters of her freshman year. (*Id.* at 37:12-16.)

[26] A handwritten letter is a personalized letter to the recruit and indicates a higher level of interest from the college than a typewritten form letter. (Tr. at 388:4-10, K. Eveland.)

[27] In addition to playing numerous varsity sports, Breanna Eveland has maintained a 3.4 grade point average. (Tr. at 636:4-5, B. Eveland.)

of playing school volleyball in the winter are increasing. "[E]xperience is becoming an overwhelming factor in the recruiting process, and there just aren't Michigan girls that are at that level." (Tr. at 333:15-20, C. Erbe.) Michigan State's women's volleyball team has no recruited Michigan players as freshmen. Nor will Michigan State have any Michigan players among the incoming freshman recruits in 2002-03. (*Id.* at 333:12-14.)

The MHSAA high school season also disadvantages Michigan girls seeking college athletic scholarships because it occurs after the NCAA's early signing date. Under NCAA rules, high school athletes can first commit to a college program during the second week of November. While there is a subsequent signing date in the spring, the majority of players sign on the first date. (Tr. at 331:20-332:5, C. Erbe.) As a result, a Michigan player is placed at a "severe disadvantage to her counterparts around the nation who are playing high school volleyball in the fall," and whose season is completed or nearly complete by the first signing date. (*Id.* at 332:14-18.) As Mr. Erbe testified:

> [L]et's say I have one scholarship left and I'm looking at a young lady from Illinois and I'm looking at a young lady from Michigan. Because the high school season is in the fall in Illinois, I can go watch that young lady compete to get a final evaluation before I make a decision. I cannot watch the Michigan player because her high school season does not start until after the signing date.

(*Id.* at 332:6-14.)

These recruiting disadvantages affect not only Michigan's elite volleyball players but also Michigan girls with a broad range of ability who could be recruited by smaller Division I programs, Division II and Division III programs, and NAIA programs. (Tr. at 329:19-330:7, 332:19-23, C. Erbe.) These disadvantages not only cost girls opportunities to participate in college athletics but further

harm those girls who, without athletic scholarships or related financial assistance, would be unable to afford to attend college or to attend the college of their choosing. (*See* Tr. at 380:6-16, K. Eveland; Tr. at 562:8-15, Breanne Hall Testimony.) The average Michigan high school volleyball player is two to three years behind players in other states. (Tr. at 369:3-6, C. Erbe.)

Michigan girls cannot be named to All-American teams and their teams cannot participate in national rankings and polls. (Tr. at 444:9-445:1, 447:5-12, J. Magelssen.) This lack of recognition further hinders girls' ability to be recruited nationally. (*See* Tr. at 501:25-502:2, D. Lopiano.)

In addition to reducing college athletic opportunities, Michigan girls' inability to participate in club volleyball programs is itself harmful. Girls miss opportunities to further develop technical skills, as well as the opportunity simply to play. Over the course of a high school career, girls will play sixteen months fewer of volleyball than they otherwise could if volleyball were scheduled in the fall because of the conflict between the club and high school playing seasons. (Tr. at 330:22-331:8, 331:9-19, C. Erbe; Tr. at 441:5-7, J. Magelssen.)

Club volleyball benefits not only the elite player but the "grass roots" player who wants to develop her skills in order to make her high school team. (Tr. at 414:8-12, 429:1-5, S. Schatz ("the players in Michigan are at a disadvantage, whether they are elite or whether they are the kid just trying to make the "A" team in high school because they have restricted amount of time that they can practice out of season, [and] attend clinics").)

In addition, this limits opportunities for girls who live at or near Michigan's borders to participate in volleyball clubs that are close in distance to them. Lynn Kostreva, a teacher and head volleyball coach at Menominee High School, testified that her daughters have been invited to compete on club volleyball teams in Wisconsin but are unable to do so because the Wisconsin club season conflicts with the

MHSAA season. (Tr. at 160:1-5, 178:11-23, L. Kostreva.) Menominee is in Michigan's Upper Peninsula, which borders Wisconsin.

Michigan girls are not able to attend college volleyball matches as a team with their coach because MHSAA prohibits such a gathering from occurring out-of-season. (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.); *see* Tr. at 180:14-181:8, L. Kostreva (testifying that, because the collegiate season and clinics occur outside of the MHSAA season, she cannot organize and accompany her volleyball team to these events).) Again, such experiences provide "inspirational and aspirational images" to girls. (Tr. at 502:3-10, D. Lopiano.)

As a result of the MHSAA winter season for high school play, Michigan club teams must travel to tournaments as far away as California, Texas and Colorado rather than playing in tournaments in neighboring states, like Indiana, because these later tournaments occur during the MHSAA season or immediately thereafter. (Tr. at 451:18-452:9, J. Magelssen.) Travel greatly increases the cost to play club volleyball, thereby limiting the number of players who can afford to play. (*Id.* at 452:22-453:3 (testifying that playing in annual Indianapolis tournament would cut club expenses by 50 percent).)[28] This kind of travel would also have an effect on academics and other activities of students involved and could make participating in club opportunities impossible.

High school volleyball teams located near Michigan's bordering states are not able to compete against teams in those states. (Tr. at 170:5-10, 175:12-22, L. Kostreva.) For example, Menominee High School is located within 50 miles of numerous Wisconsin high schools that would require shorter travel time for contests. (*Id.* at 175:3-11.) Because of the MHSAA season, however, Menominee is limited to

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[28] To pay for club expenses, players, in addition to parental assistance, seek sponsors, work part-time jobs, and hold fund-raisers. (Tr. at 380:22-381:6, K. Eveland; Tr. at 453:4-8, J. Magelssen.)

competing against Michigan schools. Contests at schools in Menominee's conference require an average travel time of 90 minutes each way, with the longest trip lasting three hours each way. (*Id.* at 171:25-172:8.) Contests at non-conference schools require even longer travel. (*Id.* at 172:9-15.) In order to arrive on time for an away contest at a non-conference school, Menominee's volleyball team leaves in the middle of the school day and does not return until approximately midnight. (*Id.* at 172:16-173:8.) Because Menominee plays most of its games on Monday and Thursday nights, most of this travel occurs during school days and school nights. (*Id.* at 173:9-13.) In addition, winter weather concerns for travel in the Upper Peninsula, or for locations in Michigan located near any state border, make shorter distances favorable for sports played in the winter season.

Menominee's boys' sports teams, however, are able to play teams from other states. (Tr. at 175:12-22, L. Kostreva (stating that Menominee boys compete against Wisconsin schools in basketball, football and wrestling).) Thus, Menominee's boys can travel as little as five minutes to play a game. (*Id.* at 198:7-14.)

Michigan volleyball players also have difficulty in obtaining specialized volleyball equipment, particularly shoes, because inventories have been depleted by college and high school teams throughout the country before the MHSAA volleyball season begins. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5- 17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony.)

The MHSAA's volleyball witness, Mr. Wilson, testified that girls benefit from playing both basketball and volleyball because the skills possessed by most volleyball players—jumping ability and lateral quickness— are valuable in both sports. (Tr. at 1050:11-18, P. Wilson.) There was no evidence, however, showing that girls who play both sports would be denied these skill-related benefits if MHSAA switched the volleyball and basketball seasons. Also, if the

girls' volleyball and basketball seasons were switched, volleyball players who desired to play on the basketball team, too, would still have the choice to do so and not participate in club volleyball. The MHSAA also presented no evidence to indicate why facilities problems would prohibit rescheduling of girls' volleyball from the winter to the fall, particularly if it were to be switched with girls' basketball.[29]

The MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride. (*See, e.g.*, Tr. Exh. 275; Tr. at 456:5-457:11, J. Magelssen (discussing the great success of 1994 Kalamazoo Dead Frogs in USA Volleyball).) However, the MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage, or whether this merely indicates that the season is a disadvantage that Michigan girls have worked to overcome. The testimony offered by Plaintiffs convinced this Court that the latter is the correct conclusion.

C. Girls' Soccer

After hearing the evidence, the Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan. Besides the evidence presented on this point, which was more than sufficient standing alone, the fact that the MHSAA originally scheduled both teams to play in fall, for reasons including the financial advantage to

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[29] Defendant MHSAA also asserted that the winter volleyball season provides Michigan girls with the ability to play two to three times the number of matches than those competing in states with a fall volleyball season. However, the MHSAA could only provide inadmissible hearsay testimony to support this assertion, which the Court may not consider. (Tr. at 1051:10-12, 1064:3-19, P. Wilson.) In addition, unless Mr. Wilson counts tournament matches or some other special circumstances, this assertion does not make logical sense, assuming that the fall and winter seasons are approximately the same length. Certainly the winter season is not two to three times as long as fall, although sometimes it may feel that way in Michigan.

conducting both programs at the same time, is additional circumstantial evidence that fall is a superior soccer-playing season in Michigan. Some anecdotal evidence was presented that logistical problems would occur if both sexes played soccer in the fall or in one season generally, but that evidence was insufficient for the Court to make a finding that logistical problems, if they exist, are insurmountable now or ever.

In 1999-2000, 11,921 girls played soccer for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' soccer state championship tournament in the spring. (Stip. Fact No. 21.) For 2001-02, MHSAA set the first practice date as March 11, the first contest date as March 22, and the end of the season as June 15. (Tr. Exh. 9(a) at 113.) This places Michigan girls' soccer in the spring season.

The NCAA schedules women's soccer in the fall. (*See* Trial Exhibit 40 at 2.) There does not appear to be one clear season in which high school girls play in soccer across the nation, but a number of states employ a number of different scheduling mechanisms for soccer.[30]

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[30] According to the Court's review of Trial Exhibit 256, twenty-seven states schedule girls' high school soccer in the fall. (Tr. Exh. 256.) Twenty-two states schedule high school soccer in the spring. (*Id.*) Three southern states, Texas, Louisiana, and Mississippi sponsor girls' and boys' soccer in the winter. (*Id.*) These numbers do not add up to fifty-one (counting the District of Columbia), though, because thirty-six states schedule both sexes to play soccer in the same season, which varies between a single fall or single spring season. (*Id.*) Trial Exhibit 256 does not indicate whether those states sponsoring both sexes in the same season have separate-sex teams or if they sponsor co-ed soccer. (*Id.*) The Court also has no indication of how many schools in Michigan may sponsor co-ed soccer teams.

In addition, states using different seasons for male and female soccer sometimes scheduled boys in spring and girls in fall. A couple of states also sponsored multiple seasons, either both fall and spring or all three seasons, for both girls and boys. (*Id.*) This might mean that there is some arrangement where boys' and girls' junior varsity plays together in one season, and the varsity teams of both sexes play in another. Two states

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer. (Stip. Fact No. 21; Tr. Exh. 40 at 2.) In 2001-02 boys' soccer, the first practice date was August 13, the first contest date was August 24, and the end of the season was November 10. This places Michigan boys' soccer in the fall season. Plaintiffs' expert Ms. Lopiano testified that the traditional playing season for soccer is the fall. (Tr. at 497:8-10.)

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. (Tr. at 598:17-601:17, D. Adrianse; Tr. at 622:14-623:1, Angie Adrianse[31] Testimony; Tr. at 1163:13-1164:2, T. Miller.) Thus, the regular season starts later than scheduled. (*Id.* at 602:7-12, Daniel Adrianse[32] Testimony.) As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season. (*Id.* at 601:22-602:15.)

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do not sponsor soccer at all, and one state did not report seasons for girls' sports. (*Id.*)

[31] Angie Adrianse currently attends Michigan State University and graduated from Caledonia High School in 2000. (Tr. at 621:11-18, A. Adrianse.) She testified on behalf of Plaintiffs. During high school, she participated in basketball, volleyball, soccer and cross-country, including playing four years of varsity soccer. (*Id.* at 622:1-8.) She received numerous soccer honors, including All Conference, All District and All Region her junior year. (*Id.* at 622:10-13.) She now plays club soccer for MSU. (*Id.* at 621:24-25.)

[32] Daniel Adrianse is the father of two daughters who played high school sports while attending high school. (Tr. at 593:6-8, 19-24. D. Adrianse.) He is also a member of Communities for Equity and testified on behalf of Plaintiffs. (*Id.* at 9-10.) His younger daughter, Angie Adrianse, also testified on behalf of Plaintiffs.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face. (Tr. at 602:18-603:17, D. Adrianse) (testifying that his daughter Angie's teams and teams she competed against suffered "a lot of injuries" as a result of playing three days a week); Tr. at 623:2-6, A. Adrianse (testifying that playing three days a week is "really hard on your body" and "practices can't even be much because you're exhausted").

Girls playing soccer in spring have some post-season tournament dates that occur after the end of the school year, so because there is no ability for contemporaneous in-school promotion of these games, it is less likely that there will be as much student or other fan support as there is for boys' soccer games. (Tr. at 604:11-607:3, D. Adrianse; Tr. at 623:15-624:25, A. Adrianse.)

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. (Tr. Exh. 5 at 19-20.) Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. (Tr. at 504:6-14, D. Lopiano.) Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider.

The MHSAA's soccer witness was Thomas Miller, a retired teacher who coaches boys' and girls' soccer at Midland Dow High School and former president of the Michigan High School Soccer Coaches Association. (Tr. at 1135:9-19, 1137:3-6, Thomas Miller Testimony.) Asked by MHSAA whether the fall or the spring is advantageous for recruiting, Mr. Miller responded only that "most of the top level players are recruited before their senior year."[33] (*Id.*

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[33] Of course, that conclusion begs the question. If girls are playing in the spring, it is obvious that recruiting would be forced to take place before the senior year for female players. That does not answer whether

at 1153:10-15.) Nor was Mr. Miller able to identify when the NCAA letter of intent signing date is for soccer. (*Id.* at 1164:7-9.)

The United States Soccer Federation (USSF) and the American Youth Soccer Organization (AYSO) club soccer seasons for high school age players take place in the spring. The Olympic Development Program (ODP) for soccer takes place during spring and summer for high school age soccer players. Because MHSAA rules prohibit athletes from playing high school sports and club sports during the same season, girls but not boys lose opportunities to participate in USSF, AYSO, and ODP programs. (Tr. at 626:11-629:8, A. Adrianse; Tr. at 504:15-24, D. Lopiano; Tr. at 1168:2-16, T. Miller.) There is some private club soccer in the fall for girls, so in the event that Michigan girls played high school soccer in the fall, girls would have to choose between those programs. (Tr. at 630:18-631:10, A. Adrianse.)

Again, Michigan girls cannot play against schools in the bordering states of Ohio and Indiana because these states conduct girls' soccer in the fall, whereas Michigan boys could compete in both states. (Tr. Exh. 256 at 15, 36.) But two of Michigan's border states, Illinois and Wisconsin, schedule soccer in separate seasons as Michigan does, with their girls and boys playing in the same seasons as Michigan. (Tr. at 1170:13-1171:7, T. Miller; Tr. Exh. 256 at 14, 23, 50.)

Plaintiffs' witness testified that Michigan girls cannot participate in national rankings or All-American individual rankings because their interscholastic season takes place after the fall traditional season. (Tr. at 504:2-5, D. Lopiano.)

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this is a detriment particular to playing in a spring soccer season, or if recruiting would still take place prior to the senior year even if girls played in fall. It also does not provide any information with respect to players who are not "top level" but who, if they were provided with equal opportunities in high school programs, might still be able to obtain non-scholarship spots on collegiate teams, scholarships in less prestigious collegiate soccer programs, or partial scholarships at better collegiate soccer programs.

Of course, reduced visibility would negatively affect ability to be recruited and produces the general disadvantage of less recognition. (*Id.*) Mr. Miller indicated that Michigan girls still have the opportunity to be nationally ranked, but did not indicate the extent to which they have been ranked or if that opportunity is at all impacted by the spring season. (Tr. at 1150:19-1152:19.) The Court therefore does not know whether the ranking takes place during the fall, and thus it is more difficult for girls to be ranked because they are relying on their distant spring season performance, or if there are special spring rankings for high school girls' teams.

There are a few advantages to playing in the spring that girls currently reap. Girls' soccer games are frequently scheduled on Friday nights in the spring season; boys' soccer games are not or are infrequently scheduled on Friday nights in the fall because of the conflict with boys' football games. (Tr. at 1148:19-1149:7, T. Miller; *see also* Tr. at 144:13-147:3, C. Engel.)

In addition, it is more difficult to obtain and provide experienced high school soccer officials during the fall season because colleges also compete in the fall. (Tr. at 1144:13-21, T. Miller.) High schools obtain better officials in the spring during the girls' season. (*Id.* at 1144:22-23.) Even though it appears that sufficient numbers of people are registered to officiate soccer, registration of soccer officials with the MHSAA does not suggest that officials are either available to work, competent or experienced. (Tr. at 1158:1-4, 1172:13-17, T. Miller.)

Mr. Miller's concerns about changing seasons, however, were all in terms of potential logistical problems that would occur if the seasons were combined, and not if boys' and girls' seasons switched with each other. Approximately one-third of Michigan high school soccer coaches coach both boys' and girls' soccer at their respective schools. (Tr. at 1140:14-19, T. Miller.) It would be difficult to coach both teams during the same season, so some existing coaches

would lose one of their coaching positions, and new coaches would have to be hired. (*Id.* at 1141:8-13, 1156:23-1157:1.) The quality of the surfaces of soccer fields will also decline with twice as many players on them. (Tr. at 1147:22-1148:4, T. Miller.)

Mr. Miller testified that he believes that if boys and girls play soccer in the same season, participation opportunities will decline because schools will have to cut team offerings as a result of logistical problems like finding sufficient officials, coaches, and fields. (Tr. at 1153:24-1154:8, T. Miller.) However, because of the lack of more specific evidence on these points, the Court is not convinced that either alternatives to these problems could absolutely not be found or that these problems would not be able to be resolved after a period of adjustment.

D. Lower Peninsula Girls' Golf

The Court finds that in Michigan, fall is the more advantageous season for playing high school golf. Again, there was plenty of direct evidence to support this finding, but the fact that the boys' golf program, which was in existence first, was moved from spring to fall also lends circumstantial evidence to the Court's conclusion. Moreover, there was no evidence that logistical difficulties would pose a problem in scheduling boys' and girls' golf at the same time.

In 1999-2000, 3,564 girls played golf for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' golf state championship tournament in the spring, at the same time that the NCAA schedules women's golf. (Stip. Fact No. 38; Tr. Exh. 40 at 2.) The MHSAA schedules the golf state championship tournament in the spring for Upper Peninsula boys and girls. (Stip Fact No. 39.) For 2001-02, MHSAA set the first practice date for Lower Peninsula girls' golf as March 11, the first contest date as March 14, and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places Lower Peninsula girls' golf in the spring season.

The MHSAA schedules the Lower Peninsula boys' golf state championship tournament in the fall, while the NCAA schedules men's golf in the spring. (Stip Fact No. 37; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys' golf as August 9, the first contest date as August 13, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' golf season in the fall.

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. (Tr. Exh. 10(a) at 6.) The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf. (Tr. Exh. 10(a) at 29.)

The traditional playing season for golf is the spring. (Tr. at 497:14-16, D. Lopiano.) But Breanne Hall, who played high school golf for East Kentwood High School and now plays college golf for University of Toledo, testified that fall is the better season for golf in Michigan for a number of reasons.[34] (Tr. at 565:6-569:4.)

In Michigan, it is easier to obtain tee times in the fall rather than the spring, and it is easier to obtain "the use of better courses." (Tr. at 567:8- 14, B. Hall; Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 6).) It is easier to obtain tee times in fall because "[a] lot of people have had all summer to play. By the time when the fall rolls around, a lot of people have put their clubs away. And when the weather starts to get nice [in the spring], everyone [in the general public] is ready to get out there and start playing." (Tr. at 567:11-14, B. Hall.) Thus, girls' teams must compete more with members of the general public for tee times than they would in fall.

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[34] Ms. Hall has earned academic honors as well. She graduated with a 3.8 grade point average from high school and has earned a 3.7 grade point average thus far in college. (*Id.* at 562:2-7, 563:10-12.)

In Michigan, the golf courses are in better condition during the fall season. (*Id.* at 565:12-18.) Girls are more likely to face cold, icy weather and frozen or muddy golf course greens in the spring and do not have the advantage of starting the season on a course which has been groomed all summer. (*Id.* at 565:12-21; Tr. at 511:5-15, D. Lopiano.) Michigan boys in the Lower Peninsula enjoy these course conditions and availability while Michigan girls do not.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. (Tr. at 564:19-565:1, B. Hall.) Michigan girls only have three years because their season occurs after the letter of intent signing date. (*Id.*)

For example, Ms. Hall, an All-State golfer as a junior and senior, was ranked among the top eight female high school golfers in the state and finished third in the state championship tournament. (Tr. at 561:13-17.) Notwithstanding her outstanding senior season, Ms. Hall only received a 50 percent scholarship to Northern Kentucky University, a Division II college, to play golf. (*Id.* at 558:24-559:7, 561:13-17.) After having a successful freshman year at Northern Kentucky and competing in a tournament against Division I teams, Ms. Hall received a 75 percent scholarship to play golf at the University of Toledo, a Division I college, where she currently attends. (*Id.* at 558:17-19, 559:8-13, 559:24-560:4.)

Moreover, Michigan boys go straight from summer play to their high school fall season, allowing them to maintain their peak condition and low scores. (Tr. at 565:24-566:8, B. Hall.) Weather conditions do not allow golf courses to stay open during the winter months. (*Id.* at 565:19-21, B. Hall.) As a result, Michigan girls begin their spring high school season without the benefit of playing during the winter and score more poorly. (*Id.* at 565:22-566:8.) This affects the recruiting opportunities for Michigan girls because

"obviously the coaches want the players with the lower [better] scores." (*Id.* at 566:14-18.)

The MHSAA pointed out that the spring season has the advantage of being the time when daylight hours are longer, so it is easier to play eighteen holes of golf without missing school than it is in the fall. (Tr. at 571:11-17, B. Hall.) However, this advantage hardly makes up for the other disadvantages of the spring golfing season.

No significant evidence was introduced to assert that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible. In addition, Plaintiffs' expert opined that boys and girls golfing together would gain psycho-social benefits from co-ed training and could play mixed tournaments or matches. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

E. Lower Peninsula Girls' Swimming and Diving

The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall. The parties presented reasons why they each believe that the fall or winter swimming season is more advantageous than the other season.

All other testimony presented objected to moving the girls' season because of concerns that both sexes in one season would create logistical problems. The Court finds that the opposition to moving girls' swimming to the same season as boys' swimming is mostly motivated by a desire to keep them in separate seasons for administrative convenience in utilizing facilities and coaches, and not particularly because there is a belief that the girls' swimming season is superior or equal to the boys' season. The Court also finds that the anecdotal evidence presented of potential logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season. If logistical problems would exist, there was also insufficient evidence that those problems would not have solutions.

In 1999-2000, 6,652 girls participated in swimming and diving for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' swimming and diving state championship tournament in the fall. (Stip. Fact No. 46.) For 2001-02, the MHSAA set the first practice date for Lower Peninsula girls as August 13, the first contest date as August 25, and the end of the season as November 17. (Tr. Exh. 9(a) at 113.) The setting of these dates puts the Lower Peninsula girls' swimming and diving season in the fall.[35] The MHSAA schedules the swimming and diving state championship tournaments in the winter for Upper Peninsula boys and girls. (Stip. Fact No. 47.) The entire season for both boys and girls in the Upper Peninsula is placed by the MHSAA in the winter because of the starting and ending dates.

MHSAA schedules the Lower Peninsula boys' swimming and diving state championship tournament in the winter. (Stip. Fact No. 45.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys as November 19, the first contest date as December 1, and the end of the season as March 9. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' swimming and diving season in the winter.

The MHSAA rescheduled the girls' swimming season from fall to winter, as Plaintiffs request here, in 1990 because "[t]here had been ten years of effort to expand girls' opportunities in the winter or at least equalize girls' opportunities in the fall, winter, and spring seasons. The Council had statistical information from the Department of Education showing unequal opportunities for girls in the winter compared to boys and compared to girls'

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35 There was some indication that the NCAA schedules men's and women's swimming in the winter. (Tr. Exh. 40 at 2.) Ms. Lopiano also testified that the traditional season for swimming and diving is the winter. (Tr. at 497:17-20.) But Mr. Phill testified that college men's and women's teams swim from September and continue through the end of March. (Tr. at 1192:19-23.)

opportunities in the fall and spring seasons." (Tr. Exh. 44.) In response to this change of seasons, the Michigan Interscholastic Swim Coaches Association (MISCA) hired an attorney to advocate its opposition to this move to the MHSAA's Representative Council. (Tr. at 1196:2-24, Greg Phill Testimony.[36]) Mr. Phill testified that MISCA hired the attorney to express the group's displeasure because "[the coaches] did not want the boys and girls together [in the same season] and we felt that that would be detrimental to the sport." Fifty of the 250 schools offering swimming also complained, and the MHSAA moved the girls' swimming season back to the fall.[37] (Tr. Exh. 45 at 236.)

Plaintiffs argue that the winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. (Tr. at 505:4- 506:1, D. Lopiano.) Sectional and regional swim meets for U.S. Swimming take place in March.[38] (Tr. at 1202:7-12, G. Phill.)

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[36] Greg Phill, who testified on behalf of Defendant MHSAA, is a swim coach for Livonia Stevenson High School and for Clarenceville Swim Club, a U.S. Swimming program. (Tr. at 1175:23-1176:6, G. Phill.) He coaches the girls' team, has been at Livonia Stevenson for sixteen years, and has been coaching swimming for twenty-five years. (*Id.* at 1176:14-15.) He has also coached and continues to coach an Olympic swimmer, Sheila Taormina, who won a gold medal in 1996 in a relay event. (*Id.* at 1176:16-1177:12.)

[37] After Lower Peninsula girls' swimming was moved back to fall, the MHSAA sponsored a competitive cheerleading tournament for girls in the winter to add an athletic opportunity. (Tr. Exh. 52.)

[38] Mr. Phill testified, upon questioning by one of the MHSAA's attorneys, that in Michigan, the highest level of regular-season competition is found in high school swimming, as opposed to U.S. Swimming club-level swimming. (Tr. at 1192:8-12.) Presumably, this was in response to the fact that girls miss U.S. Swimming club competition because of the season in which they swim. This does not prove that missing U.S. Swimming competitions is not a detriment, however. Even if it is true that high school competition is higher level, girls who seek

The Phillips 66 national swim championships are in March/April of each year. (Tr. at 1202:13- 24, G. Phill; Tr. at 505:4-506:18, D. Lopiano.) In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition. (Tr. at 506:19-507:4., D. Lopiano.)[39]

Finally, the boys' swimming season is nearly two weeks longer than the girls' season, giving the boys a greater opportunity to practice and compete. (Tr. at 500:25-501:1, D.

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additional swimming opportunities through club participation are denied participation in this particular club program or in these particular competitions.

While girls' amateur participation opportunities are affected by missing amateur competitions, the Court finds that recruiting opportunities are not affected one way or the other. Collegiate recruiting is not dependent on seeing the swimmer, since "[b]asically swimming is a black and white sport. You're either this fast or you are not that fast, and that's what they look at. Most college recruiting is done from [an] office." (Tr. at 1190:18-1191:2, G. Phill.) In addition, girls would be able to rely on their final, senior year season performance to attempt to obtain a scholarship or the opportunity for a non-scholarship spot on a collegiate swim team.

[39] Plaintiffs' expert testified that this is particularly crucial because Michigan boys are able to do a single "taper," whereas Michigan girls must do a double "taper" to compete in the state championship in the fall and the national championships in the winter. (Tr. at 505:4-506:1, D. Lopiano.) A taper is designed to have a swimmer peak in time for a championship event. It involves intense training over a period of time, usually at the season's beginning, followed by a gradual decline in practice workload so that the swimmer can physically recover and can be primed to swim his or her fastest times. (*Id.* at 506:2-18.) It is extremely difficult to do tapers in close proximity to each other because of the time and physical exertion required. (*Id.* at 505:12-16.)

Michigan boys are able to focus on a single taper because the national tournaments are usually the week after the MHSAA state championship tournament. (Tr. at 505:16-506:1, D. Lopiano.) Michigan girls do not have that benefit because their high school season has concluded in late November. Michigan boys who dive are able to go straight from their winter season to the national open amateur tournament in March, whereas girls have a competition gap unless they are able to afford a private diving club and continue their training in preparation for the national tournaments. (*Id.* at 506:19-507:4.)

Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).)[40]

The MHSAA offered testimony on the reasons why the fall season could be considered superior or equal to the winter season for swimming. Mr. Phill said that high school swimming programs in Michigan are flourishing for girls, but declining for boys. (Tr. at 1184:22-1185:17, G. Phill.) He believes that this is because the fall season for girls allows them to transition from summer swimming and clubs to the high school program in the fall, but boys do not have the same incentive to return to winter high school competition after taking the fall season off. (*Id.*) There could well be other reasons for a decline in boys' programs, like the rise of other sports offered for boys in fall, particularly soccer, for example. In addition, Mr. Phill testified that he and other girls' swimming coaches feel that fall is superior to winter for the swimming season because there are not the distractions of the winter season, like exams, the winter break for the holidays, or spring break. (Tr. at 1181:12-17, G. Phill.)

The rest of the MHSAA's evidence about swimming centered on its assertion that participation opportunities for both girls and boys would decrease if both swam in the same season. Approximately one-third or more of Michigan's high school swimming coaches coach both girls' and boys' programs for their respective schools. (Tr. at 1188:22-1189:1, G. Phill.) Mr. Phill testified that coaches could not

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[40] One of Plaintiffs' experts argued that putting Lower Peninsula swimming and diving into the same season would allow teams to share travel, promotion, coaching, and facility rental time. In addition, she argued that they could swim mixed relay events together and have a swimming program even if there are not enough athletes for a single-sex team. There was simply no empirical evidence presented to enable the Court to make a finding on those assertions. However, the Court believes Plaintiffs' expert's assertion that there can be attendant psycho-social benefits when young males and females train and compete together, in certain circumstances. (*See* Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

coach both teams at the same time. (*Id.* at 1189:2-24.) Clearly, this means that some unknown number of new coaches would have to be hired if boys and girls swam in the same season. There was no testimony regarding how difficult or easy hiring these coaches would be.

Joining the seasons would also cause a decline in club programs that rent pool space from schools. (Tr. at 1187:25-1188:4, G. Phill.) Presumably, this would only occur in the combined season, not in the season when no high school teams would be swimming.

Mr. Phill asserted that the dimensions of swimming pools to which he has been in states where boys and girls swim in the same season are often 50 meters by 25 yards. (Tr. at 1183:11-13.) There are no high school pools in Michigan with dimensions of that size. (Tr. at 1183:15-17, G. Phill.) There was no testimony regarding how well Upper Peninsula schools manage, in terms of having sufficient pool space, in offering swimming to both sexes in the winter. Mr. Phill further testified that at Livonia-Stevenson High School, where he coaches, the girls' "B" team would have to be eliminated if the seasons were joined.[41] (Tr. at 1186:13-20.)

F. Girls' Tennis

After reviewing the evidence, the Court finds that spring is the more advantageous playing season for tennis. In addition, the MHSAA presented no evidence that both sexes playing tennis in the same season would create logistical problems.

In 1999-2000, 8,759 girls played tennis for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' tennis state championship tournament in the fall. (Stip. Fact No. 36.) For 2001-02, MHSAA set the first practice date as August 13, the first contest date as anytime

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[41] Mr. Phill testified that the Livonia-Stevenson girls' team currently has sixty-four girls, whereas he expects the boys' team to have eighteen in this winter's season. (Tr. at 1183:18-24.)

after the first practice, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) These decisions place girls' tennis in the fall.

MHSAA schedules the boys' tennis state championship tournament in the spring, at the same time that the NCAA schedules women's and men's tennis. (Stip. Fact No. 35; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice and contest dates for boys' tennis as March 11 and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places the boys' tennis season in the spring. The traditional playing season for tennis is the spring. (Tr. at 497:11-13, D. Lopiano.)

Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play. (Tr. at 508:4-509:3, D. Lopiano; Tr. at 700:21-701:13, L. Bunker.) In addition, the girls' high school tennis season is approximately 20 days shorter than boys' tennis. (Tr. at 500:20-24, D. Lopiano; Tr. Exh. 63.)[42]

IV. PSYCHOLOGICAL AND GENERALIZED HARMS TO MICHIGAN GIRLS

The current scheduling of seasons harms Michigan girls in a number of ways that can be generalized across all of the sports at issue in this case. First, the practice of scheduling only girls' sports, but not boys' sports, in disadvantageous and/or non-traditional seasons sends the clear message that female athletes are subordinate to their male counterparts,

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[42] Putting girls' and boys' tennis into the same season would allow teams to share travel, promotion, coaching, and facility rental time. They could play mixed doubles matches together and have a tennis program even if there are not enough athletes for a single-sex team. Moreover, there are psycho-social benefits from young males and females training and competing together. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

and that girls' sports take a backseat to boys' sports in Michigan. (*See* Tr. Exh. 81 at 1.) It also deprives girls of contemporaneous role models, skills development, and team-building opportunities.

These scheduling practices also have a negative effect on the gender role socialization of Michigan's girls.[43] Treating boys and girls differently and inequitably in athletics can contribute to or cause girls and boys to have dramatically different perceptions of self-worth and to cause girls to have lower expectations for themselves. (*Id.* at 676:13-19.)

When girls are treated unequally as compared to boys, girls receive the psychological message that they are "second-class" or that their athletic role is of less value than that of boys. (Tr. at 494:9-556:1, D. Lopiano; Tr. at 673:3-15, 679:11-680:13, L. Bunker.) Being scheduled in a non-traditional season, or in a season that is clearly disadvantageous while boys are scheduled in the clearly advantageous season, gives girls this "second-class" status message. (Tr. at 638:25-639:6, B. Eveland; Tr. at 340:17-344:22, C. Erbe; Tr. at 450:19-451:5, J. Magelssen; Tr. at 137:2-137:11, C. Engel.)

This message stays with girls throughout adulthood and can extend to careers and interpersonal relationships. (Tr. at 673:16-674:12, L. Bunker.) When girls receive separate and unequal treatment, this teaches them to expect discrimination, so that they may not even recognize discrimination when it occurs. (*Id.* at 714:1-715:8.) In addition, girls may be wary of change because they do not know what to expect or fear that the situation could become even worse for them.[44] (*Id.* at 679:11-683:19, 715:9-21; *see also* Tr. Exh. 254.[45])

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[43] Gender role socialization is the psychological term used to explain how an individual learns what is expected of him or her based on his or her sex. (Tr. at 665:24-666:03, L. Bunker.)

[44] Dr. Bunker examined a study conducted by the Office for Sex Equity and Education of the Michigan State Department of Education on

Differential and unequal treatment of boys and girls in the scheduling of seasons can psychologically affect girls in negative ways. (Tr. at 679:11- 680:13, L. Bunker.) If girls recognize that boys always play in the traditional seasons while girls play in the non-traditional seasons, coupled with other unequal treatment such as prime time game scheduling, girls may develop unhealthy coping mechanisms to rationalize away the unfair treatment. (*Id.* at 680:2-13.)

One of these mechanisms might be to establish lower expectations. That is, a girl will recognize she is being discriminated against but expect that this will continue for the rest of her life and assume she must adjust to the

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the perception of boys and girls and their interactions in the school environment. (Tr. at 670:10-20, L. Bunker; Tr. Exh. 105 (4/92 Report: "The Influence of Gender-Role Socialization on Student Perceptions").) While the Court gives this study very little weight in its consideration of the evidence, it is interesting to note that the results of this study done in Michigan tend to confirm the expert opinions of Dr. Bunker.

This study asked Michigan high school boys and girls to imagine their reaction if they woke up the next morning as a member of the opposite sex. (Tr. at 671:4-8, L. Bunker.) Twenty-two percent of the female respondents indicated that they had at some point wanted to change gender. (Tr. Exh. 105 at 3, 11-12; Tr. at 671:8-11, L. Bunker.)

In contrast, only three percent of the male respondents said they had ever considered wanting to be a girl. (Tr. Exh. 105 at 3.) "More than any other item," girls who wanted to change gender believed they would receive better athletic opportunities. (Tr. Exh. 105 at 11-12; Tr. at 671:8-11, L. Bunker.) Boys, on the other hand, perceived that if they were a girl they would receive second-class treatment. (Tr. at 676:17-19, L. Bunker.)

[45] In a survey conducted by Western Michigan University and commissioned by the MHSAA for this lawsuit, girls who were asked to comment on the possibility of changing their sports seasons indicated some concern that if seasons changed or combined with boys' seasons, girls would end up with worse practice or playing times or other disadvantages. For example, one girl said, "... Putting sports like basketball or tennis into the same season for both boys and girls is probably a disadvantage to the girls. This is because many schools will treat the girls teams as if they aren't important. The girls will not get as good practice or coaching in many cases." (Tr. Exh. 254 at 43.)

discrimination rather than seek to change it. (Tr. at 680:17-22, L. Bunker.)

For example, Kristi Madsen, a former high school athlete, testified that she felt that it "hurts" girls' self-esteem "[w]hen you look to your counterparts, the males, and they are playing in the right seasons, they get all the benefits that come along playing in the right season, and then you look at where you are, I think it hurts [self-esteem]." (Tr. at 109:8-17, Kristi Madsen; Tr. at 16:7-17:10, D. Madsen (testifying that her daughter believed that she has to be "good enough to play on a boys' team" in order to receive equal benefits in athletics).)

Discriminatory treatment of girls also has an effect on boys. Boys receive the message that girls are inferior and are harmed by that message. (Tr. at 135:24-137:16, 141:18-142:2, Connie Engel[46] Testimony; Tr. at 671:22-25, L. Bunker.) As parent Connie Engel said, "This is creating a situation where [my son] believes that girls are second-class .... My children, my son and my daughters, don't get to experience [basketball's "March Madness"] together and they know that they are treated differently." (Tr. at 137:2-137:11, C. Engel.)

In addition, there are other harms, which could seem minor to some, but in the aggregate act to reinforce the inconvenience and unfairness of playing in a disadvantageous season. For example, girls playing sports outside of their traditional seasons have difficulties obtaining current season equipment for the sport. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5-17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony; Tr. at 494:9-556:1, D. Lopiano.) Girls also have diminished

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[46] Connie Engel is the mother of three children, two daughters and one son, who attended or currently attend Forest Hills Central High School and who all participated in or currently participate in interscholastic athletics there. (Tr. at 126:17-127:12, C. Engel.) She is also a founding member of CFE. (*Id.* at 134:19-20.)

opportunities for recognition in national athletic publicity and rankings, like USA Today's weekly Top 25 high school rankings, or all-America honors, like from Parade All-America or McDonald's All-American teams. (Tr. at 494:9-556:1, D. Lopiano.) In addition, Michigan girls are denied the experience of participating in promotional events like basketball's "March Madness," national shootouts, three-on-three tournaments, and similar competitions. (*Id.*)

Furthermore, Michigan's seasons differ from a majority of other states, or many other states, depending on the sport. Girls transferring in or out of Michigan schools mid-year can be prevented from playing a season of interscholastic athletics because they have missed the season. Playing out of a traditional season also limits one's choice of opponents, as well, including the ability to play teams in neighboring states. In addition, girls who end up playing in college must adjust to different collegiate seasons. (Tr. at 712:20-713:10, L. Bunker.)

Because the MHSAA schedules some girls' sports, *but no boys' sports*, in non-traditional seasons, girls, *but not boys*, must choose among sports they already play when they enter high school. (Tr. at 32:9-34, D. Madsen.) For example, girls who play sports in community recreation programs before high school often play with boys in the same, traditional and/or more advantageous seasons. (*Id.*) But when girls enter high school, they must choose between sports when some of those sports are scheduled in different seasons and create conflicts, and boys do not face this choice. (*Id.*)

Finally, participation opportunities for girls in the winter are limited, perhaps as a result of this scheduling. The MHSAA schedules five sports for boys in the winter, basketball, wrestling, ice hockey, skiing, and swimming and diving. (Tr. Exh. 63.) Three winter sports are scheduled for girls: volleyball, gymnastics, and skiing. Very few MHSAA member schools have girls' gymnastics or skiing teams, (Tr. Exh. 99), so most Michigan girls have the opportunity to

participate in one winter sport, whereas boys would have three or four, depending on the availability of boys' skiing and ice hockey. "The vast majority of Michigan high schools conduct only one sport for girls in the winter. Fewer than 20% sponsor two sports. Fewer than 2% sponsor three sports. The addition of girls swimming in the winter schedule at more than 200 schools fills a desperate need for many MHSAA member schools and their female athletes." (Tr. Exh. 44 (Editorial by MHSAA executive director John E. Roberts, 1990-91 MHSAA Bulletin).) Girls' swimming was later moved back to fall, however.

V. DEFENDANT MHSAA'S JUSTIFICATIONS FOR CURRENT SEASONS

The MHSAA has argued that the girls' sports at issue in this lawsuit are scheduled in superior or equal playing seasons. This is an argument that this Court wholly rejects after reviewing the facts presented at trial for the reasons described in the previous sections.

In addition, the MHSAA has presented a set of justifications for scheduling girls' seasons as it has that fall into the categories of available facilities, coaches and officials, i.e., concerns that logistical limitations require putting the sexes in separate seasons in order to maximize participation slots in every sport. These concerns, while legitimate, would at most permit the MHSAA to schedule girls' and boys' teams in separate seasons, but the two sexes would have to split advantageous and disadvantageous sports equally. It is clearly not equitable for girls to play in all of the disadvantageous seasons and for boys to play in none of them. Nonetheless, for reasons discussed both in the previous section and in this section, Defendant MHSAA presented insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season.

Finally, the MHSAA presented arguments that absolutely do not legally justify providing Michigan girls

with different and unequal treatment. These arguments were that Michigan girls prefer seasons as they are, which, among other problems, the Court found to be a dubious conclusion; that member schools prefer the current seasons; and that girls' programs need an "independent identity" from boys' programs, which is allegedly provided by putting girls in a different season. These are discussed below.

A. Logistical Concerns

1. Facilities

Ensuring the greatest number of participation opportunities for children in interscholastic sports is a legally legitimate goal, as well as wise policy. To this end, being able to sponsor freshman and junior varsity teams, larger squads, and maximum playing time for the most young people are also legally legitimate goals. (*See* Tr. Exh. 106.) Nonetheless, the Court is not convinced that the MHSAA's scheduling system maximizes participation or is the only method by which to maximize participation because insufficient evidence on these points was presented. Moreover, the Court finds that administrative convenience against a historical background of treating girls' athletics inequitably, and not actual empirical evidence, is a major cause of existing scheduling.

The MHSAA argues that it cannot schedule basketball, soccer and swimming concurrently for boys and girls because there are insufficient gymnasiums, soccer fields and pools in Michigan. (Tr. at 1139:18-19, T. Miller Testimony; Tr. at 1183:1-17, G. Phill; Tr. at 799:11-23, K. McGee.) To combine seasons in some or all separately-scheduled sports, the MHSAA argues, would have the effect of reducing participation opportunities for both boys and girls by forcing schools to cut team size or cut freshman or junior varsity teams.

However, considering that the MHSAA bore the burden of production and persuasion on this point, the evidence presented was insufficient to convince the Court. The evidence was almost exclusively anecdotal. For instance,

the MHSAA did not present enough evidence at trial to demonstrate how many schools have inadequate facilities to allow girls and boys to swim or play soccer in the same season. In terms of pool space, thirty of the forty-three states sponsoring boys' and girls' swimming schedule the seasons concurrently. (Tr. at 1200:18-22, G. Phill; Tr. Exh. 256; Tr. Exh. 62.) The boys' and girls' swimming teams in Michigan's Upper Peninsula also swim in the same season. (Stip. Fact No. 47.) In addition to boys' teams, MHSAA member schools accommodate other teams in the winter by renting their pools to swimming club teams. (Tr. at 1187:21-1188:4, G. Phill.) Even assuming that Mr. Phill's assertion that the size of the Livonia-Stevenson pool would force him to cut participation on the Livonia-Stevenson girls' team is true, that says nothing about what alternatives have been considered, like community pools, or what the situation is in the rest of the state.

In terms of soccer field space, thirty-seven of the forty-eight states sponsoring boys' and girls' high school soccer schedule the seasons concurrently. (Tr. at 1162:16-20, T. Miller; Tr. Exh. 256 (1999-2000 National Federation Sport Season Survey).) Moreover, soccer fields in Michigan are now being used concurrently by boys and girls because girls' club teams are playing in the fall (when boys' high school teams are playing) and boys' club teams are playing in the spring (when girls' high school teams are playing). (Tr. at 1164:24-25, T. Miller.) The soccer situation is similarly unclear to this Court to make a finding that logistical problems would exist in the event that girls and boys played in the same season.

Assertions have been made that some schools may have difficulties accommodating both girls and boys in the same season in swimming and/or soccer, but it does not suggest to what extent this would be a problem. More importantly, there was no indication whether any facility alternatives are possible and have been considered, or if the position that facilities are simply inadequate to accommodate girls and

boys at the same time throughout Michigan has been adopted without further study because that is the conventional wisdom.

The MHSAA did not present any evidence that boys and girls cannot play tennis or golf in the same season. Moreover, there was evidence at trial, which the MHSAA did not refute, that girls and boys can play basketball in the same season with little difficulty, if any, if girls' volleyball is moved to the fall season.

In terms of gymnasium space, a school with a single gym can accommodate boys' and girls' basketball teams practicing and playing concurrently. (Tr. at 459:22-460:12, J. Magelssen (testifying that most Michigan schools in Classes A, B, C and D have one gym that accommodates various indoor sports simultaneously); Tr. at 941:1-8, James Glazier[47] Testimony (testifying that there would be no problem at his current school and previous school if volleyball and girls' basketball facilities were switched).) For instance, Michigan high school gyms already have boys' basketball and girls' volleyball teams practicing and playing concurrently.

Practice times can be alternated weekly or each season so that boys practice right after school one week or season and the girls practice right after school the next. (Tr. at 517:20-25, D. Lopiano.) Boys' and girls' basketball games can likewise be played in the same season through "normal scheduling mechanisms" used in the 48 states in which boys and girls play basketball at the same time. (*Id.* at 517:17-518:11.) For example, boys' and girls' games can be scheduled so that one team or the other is playing at home, or they can play doubleheaders and flip-flop times in a doubleheader so that girls and boys have an equal opportunity for prime time. (*Id.*) Girls' basketball teams

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[47] Mr. Glazier is former athletic director at Grandville High School and is currently assistant principal at Caledonia High School. (Tr. at 916:6-12, J. Glazier.)

currently do not have to share gym space with volleyball or boys' basketball teams. But "having the gym to yourself [is not] a justifiable reason for treating boys different from girls." (Tr. at 833:15- 834:4, K. McGee.) In addition, playing in the fall, with no other teams needing gym space then, has not given at least some girls' basketball teams the ability to play games on Friday nights, since boys' football plays that night. (Tr. at 93:16-94:9, Kristi Madsen.)

It is true as the MHSAA points out that if girls' volleyball and basketball were switched, and girls' volleyball players had increased opportunity to play club volleyball, they would have to make a choice between club volleyball and high school basketball. (Tr. at 1050:25-1051:9, 1062:14-1063:4, P. Wilson.) Nonetheless, this is a choice for a young woman and her family to make, not the MHSAA. Girls are entitled to equal opportunities to be able to make these choices.

The MHSAA points to the high ranking of Michigan among the states for numbers of boys and girls participating in various sports as evidence that the current scheduling of seasons maximizes participation opportunities and argues that scheduling is the reason why participation numbers are what they currently are. (*See* Tr. Exh. 219 (1999-00 National Federation Sports Participation Survey).) The argument is that other states, who in many sports schedule both sexes in the same season or schedule girls in a different season than Michigan does, have lower participation numbers than Michigan because those states' scheduling creates problems that decrease participation opportunities for students. This is circumstantial evidence that simply proves little, in that the comparison between Michigan's participation numbers and other states' participation numbers is not apt.

First, one would expect Michigan to rank at least eighth in the nation in numbers of participants in each sport, since Michigan has the eighth highest population in the country. *See* 1999-2000 Census. So ranking among the top ten states

in a sport's participation numbers is not particularly instructive. Even where Michigan ranks higher than eighth, there are an unlimited number of other factors that influence participation numbers besides seasons, like school funding in general and athletic program funding in particular, the number of schools in a state sponsoring a particular sport, cultural attitudes in a state, the influence of weather on outside sports, etc. Without more, the Court cannot draw the conclusions from this data that the MHSAA asks be drawn.

2. Officials and Coaches

The MHSAA argues that it cannot schedule soccer and swimming for boys and girls concurrently because there are insufficient numbers of coaches in Michigan. (*Id.* at 1139:20-23, T. Miller; Tr. at 1189:14-24, G. Phill.) Similarly, the empirical evidence on this point was too sparse to make a finding that this is true. The circumstantial evidence that logistical problems could be resolved or would not exist in the first place was just as strong.

The MHSAA further argues that it cannot schedule soccer for boys and girls concurrently because there are insufficient numbers of officials in Michigan. (Tr. at 1140:8-13, T. Miller.) There are no special qualifications to officiate soccer matches between MHSAA member schools. A prospective official need only register with the MHSAA, which involves passing an open-book examination on MHSAA's rules and regulations, and pay a registration fee to the MHSAA. (Tr. at 1158:17-20, T. Miller.) The MHSAA asserted, but did not demonstrate, that some schools could have trouble finding "qualified" MHSAA-registered game officials, but there was little evidence that MHSAA-registered game officials would be unqualified if more were needed in a single season or if the existing officials were needed for more games during a single season.[48]

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[48] In addition, Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, agreed on cross-examination that she is aware that some

Thirty-seven states, as well as Upper Peninsula schools, are able to schedule boys' and girls' soccer concurrently. (Tr. Exh. 256; Stip Fact No. 47.) Presumably, the Upper Peninsula[49] and those other states have enough officials and coaches. Thirty states are able to schedule boys' and girls' swimming concurrently and presumably provide an adequate number of coaches. Upper Peninsula schools likewise have boys and girls swim in the same season with a presumably adequate number of coaches. (Stip. Fact No. 47.)[50]

B. Michigan Girls Prefer the Current Seasons

The MHSAA asserts that, based on a survey that it commissioned Western Michigan University's Evaluation Center to conduct after this lawsuit was filed, Michigan girls prefer to play in the current seasons. (Tr. at 1014:22-1016:9, 1020:21-23, Daniel Stufflebeam[51] Testimony; Tr. Exh. 254 (4/15/99 Sports Seasons Survey Final Report).) The Court reads the results of that survey differently than the MHSAA does, as discussed below. Moreover, the Court

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volleyball coaches oppose changing the girls' season because they believe that volleyball officials would not be as available during the fall season when college teams compete. (Tr. at 278-283, B. Norman-Nakamura.) However, the MHSAA did not offer the testimony of coaches holding these beliefs, nor any other evidence to support this claim.

[49] Clearly, the Upper Peninsula has a much smaller population than most states and the Lower Peninsula of Michigan, but the Upper Peninsula's experience is comparable in that while the number of teams, and thus the number of officials and coaches needed, would be smaller, so would the total population from which those officials and coaches could be drawn.

[50] Moreover, there was only some discussion of whether it would be possible for boys and girls to be coached by the same individual and/or practice together to save resources like coaches and facility usage. If such an arrangement were logistically possible and outweighed other disadvantages, Plaintiffs' experts also testified that there is psycho-social benefit to boys and girls training together where appropriate.

[51] Dr. Daniel Stufflebeam is director of the Evaluation Center at Western Michigan University, which conducted the survey for the MHSAA. (Tr. at 986:13-17, 998:21-999:9, D. Stufflebeam.)

notes that while a number of accomplished high school and college student-athletes testified about the disadvantages of the current seasons, the MHSAA did not offer the testimony of any girl or parent who was in favor of keeping the current seasons.

In addition, the survey suffers from design flaws and bias, some of which the Court will review here. Dr. Stufflebeam testified that the survey form listed potential negative consequences of moving the girls' seasons at issue in this case and asked girls how objectionable they found those consequences. (Tr. at 1036:11-1037:6, D. Stufflebeam; Tr. Exh. 254 at 18.) No benefits of changing the seasons were presented to the surveyed girls. (*See* Tr. Exh. 254.) Further, Dr. Stufflebeam testified that the potential negative consequences identified in the survey were provided by the MHSAA's attorneys. (*Id.* at 1037:7-1038:23.) No consultation was done with Plaintiffs' attorneys for suggestions of positive benefits to changing seasons to ask girls about in the survey, nor was any independent analysis conducted to determine the potential benefits and detriments of moving any seasons. This was likely because of the time pressures involved in conducting this survey under the parameters placed on the Evaluation Center by the MHSAA's attorneys, based on when it was needed for this litigation. (*Id.* at 1020:21-1023:23, 1031:7-20.)

Sixty of MHSAA's 729 member schools participated in the student survey. (Tr. at 1026:6-13, D. Stufflebeam.) Only one-third of the girls in these 60 schools were surveyed, and nearly one-third of respondents participated in sports that are not played in disadvantageous seasons. (*Id* at 1026:6-13, 1029:3-6.)

In addition, the original, written survey responses were destroyed after the data from them was entered into a database, but before Plaintiffs or their expert could review them. (Tr. at 1029:16-1030:5, D. Stufflebeam.) Thus, it is impossible to tell what subjective answers where girls could write comments match to what objective responses to the

objective questions, and therefore, it is impossible to ascertain why girls with certain opinions may have held those opinions.

Even setting aside these flaws, the Court is not at all convinced that the survey results themselves support the MHSAA's position that Michigan girls largely prefer current scheduling. In responding to the question of whether "all high school sports seasons should be the same as college," for example, 31.4 percent of the respondents said no, 31.3 percent said yes, and over 37 percent had no opinion. (Tr. at 1030:13-22, D. Stufflebeam; Tr. Exh. 254 at 26.) This is hardly overwhelming support for maintaining current, non-traditional seasons employed by most of the girls' seasons at issue in this lawsuit.

Moreover, some of the survey responses of the female athletes that indicated that some of those who opposed changing seasons did so because they feared boys would receive better treatment and practice times if the girls moved to the same playing seasons as boys. (Tr. Exh. 254 at 39 *et seq.*; Tr. at 1031:7-1035:9, D. Stufflebeam.) If girls and boys play a sport in the same season, however, individual schools are under legal obligation to give girls and boys equal treatment in practice and game times, for example.

In addition, the Court has some concern that girls would indicate a desire not to change simply in order to avoid being branded troublemakers or because they have come to believe that an inequitable situation is their lot in life. For example, one respondent said, "I think sports seasons are good the way they are—I would like girls' sports to be a bigger deal, but I don't want to put up a stink." (Tr. Exh. 254 at 43.) In sum, the collection of opinions of girls presented from the WMU Survey does not show that the current seasons are equitable or even that Michigan girls believe that they are equitable.

C. Member Schools Prefer the Current Seasons

The MHSAA argues that the majority of member schools, most recently in 1998, have indicated that they

prefer the current seasons. (Tr. Exh. 39 (1998 Survey Form); Tr. Exh. 229 (1973, 1979, 1981, 1985 & 1994 School Surveys).) The Court notes first that if, after applying the facts to the law, the seasons as they have been currently set by the MHSAA violate the law, they violate the law regardless of the preferences of the member schools.

To the extent that the Court has considered preferences of the member schools, as the Court could ascertain those through the available evidence, it has only been in the context of assuming that member schools may have had actual non-discriminatory reasons based on empirical facts for preferring certain seasons for certain sports over others.

It is also possible, however, that school representatives may prefer seasons the way they are simply for administrative convenience, since school representatives have a great deal else to do every day besides consider this one issue. The Court has also considered this possibility and has thus given very little weight, if any, to the member schools' preferences, as expressed on the MHSAA surveys, as an indication of whether the current sports seasons are legally equitable. A comprehensive study of the possibilities of changing seasons, as well as the advantages and disadvantages of various seasons, should have been the task of the MHSAA. The Court has instead relied much more heavily on the facts presented in this litigation regarding the benefits and disadvantages of different seasons for different sports.

In addition, the form of the MHSAA's surveys over the years made them of very little use to this Court. For example, the MHSAA prepared two draft survey forms for its 1998 survey. (*See* Tr. Exh. 40.) One form asked the schools for their position on each separate sport (so that a school could indicate whether, for instance, it would favor moving basketball and volleyball but not swimming). The second form, which MHSAA actually sent the schools, asked the schools for their position on whether all sports should be moved with no option to vote in favor of moving certain

sports but not others. (*Id.* at 2.) The straight, "up or down" vote approach, which is the one that was used, has obvious limitations, since there are a number of ways in which seasons scheduling could be changed. In addition, the survey form used provided information only on potential coaching conflicts based on current coaching arrangements, but does not provide any other information as to whether additional coaches could be hired. (*Id.*) Finally, the survey provided no look at schools' other reasons for desiring the status quo. (*Id.*)

Finally, the MHSAA has placed sports seasons without regard to survey results or moved sports seasons without first surveying member schools, including boys' golf, girls' soccer and girls' swimming. (Tr. Exh. 29 at 2; Tr. Exh. 10(d) at 5; Tr. Exh. 81 at 1.) More member schools (sixty) voted to schedule the soccer seasons separately than those who wanted the seasons together (eighteen), but most schools expressed no preference (507) or otherwise did not vote on this issue or at all. (Tr. Exh. 229 (1981 Survey—Soccer).) After the MHSAA placed both soccer seasons together in the fall, several school administrators complained, and girls' soccer was moved to spring. (Tr. Exh. 47 at 3; Tr. Exh. 10(d) at 5.) The MHSAA originally placed girls' basketball in the fall even though girls' basketball coaches and many schools originally wanted to stay in winter, where it was before it was sanctioned by the MHSAA, and ignored the initial vote of girls' basketball coaches to move the season back to winter. (Tr. Exh. 78.) The MHSAA unilaterally moved girls' swimming in 1990- 91 from fall to winter "as a matter of fairness, a matter of trying to do the most good for the most number of girls," before it was moved back to fall. (Tr. Exh. 44.)

D. Giving Girls an "Independent Identity"

The MHSAA asserted at trial that playing basketball in the fall rather than the traditional winter season benefits girls because they do not have to compete with boys' basketball for attention of many kinds, and thus receive

increased recruiting opportunities and media coverage. (*See* Tr. at 794:3-22, 796:14-16, K. McGee.) Ms. McGee, the MHSAA witness who offered the assertion, said she felt that putting girls in a separate basketball season demonstrated that girls could bring fans out to their games and be successful in basketball without a contemporaneous companion boys' team in the same season. (*Id.* at 794:3-17.) But Ms. McGee also acknowledged that it is true that if MHSAA moved the girls' basketball season to the winter, Michigan girls would be placed on an "equal footing" with Michigan boys and girls in the rest of the country. (*Id.* at 851:18-852:4.)

The concept of having an "independent identity" is also based on the premise that boys will "overshadow" girls in fan support and media coverage if boys and girls play basketball in the same season. (Tr. at 829:23-830:1, 846:3-7, 849:4-850:6, K. McGee.) This conflicts with giving girls a separate season so they can prove that their program stands on its own. With all due respect to Ms. McGee, who obviously cares a great deal about coaching and the girls that she coaches and only wants the best for female players, the Court finds that separate basketball seasons sends a message that the girls' basketball programs cannot be "fitted in" to the "regular" basketball season of winter. Girls' basketball programs, however, are just as important as boys' programs, and girls deserve to play in the "regular" season, too.

In addition, to achieve this "independence," girls, among other things, play basketball on two school nights because "football is on Friday nights" in the fall. (Tr. at 825:24-828:11. K. McGee.) The winter season makes it feasible for boys to play basketball on Tuesdays and Fridays. (*Cf.* Tr. at 94:2-6, Kristi Madsen.)

Ms. McGee's assertion that girls' basketball in the fall receives more media coverage than boys' football in the fall is based on girls playing twice a week, and therefore receiving post-game coverage twice a week, and boys

playing football once a week, and therefore receiving post-game coverage once a week. (Tr. at 832:9-25, K. McGee.) Ms. McGee, however, provided no documentation supporting her assertion that girls receive more media coverage in the fall compared to boys' football. (*Id.*) In addition, Ms. McGee coaches one of the most successful girls' basketball programs in Michigan. Other girls' basketball programs may very well not receive the same quantity and quality of media coverage that Flint Powers' program does, even if playing in the fall season has some effect on the quality and quantity of media coverage received generally.

Moreover, Dr. Linda Bunker testified that if girls were in fact to receive less media coverage compared to boys by playing basketball in the winter, it is better preparation for adulthood for girls to recognize this and decide for themselves how they will handle situations that they view as inequitable. (Tr. at 738:10-25, L. Bunker.) If girls "ha[ve] the opportunity to visually see they are not being given the same amount of press coverage, then they have an opportunity to do something about it, whether it's they or the newspapers or the parents or the community, have a chance head on to address the issue of inequities." (*Id.*)

CONCLUSIONS OF LAW

I. PLAINTIFFS' FOURTEENTH AMENDMENT CLAIM

A. Defendant MHSAA is a State Actor

The Fourteenth Amendment to the United States Constitution provides, "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. To be liable under 42 U.S.C. § 1983 for violating the Fourteenth Amendment, an entity such as Defendant must be considered a "state actor."

The United States Supreme Court found recently that another state's high school athletic association, the Tennessee Secondary School Athletic Association (TSSAA), was a "state actor" after considering facts regarding the TSSAA's make-up and role in the administration of high school athletics in Tennessee. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001). The Supreme Court noted that, "The nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298, 121 S. Ct. 924. Among the facts that the Supreme Court found relevant to reaching this determination were a TSSAA membership of predominantly public schools; revenue coming from membership dues and gate receipts from tournaments held at member schools; state officials given *ex officio* status on the legislative council; and eligibility of TSSAA employees for the state employees retirement system. *Id.* at 298-300, 121 S. Ct. 924. The Supreme Court noted that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, and that mechanism took the form of public school officials acting together under the auspices of the TSSAA. *Id.* at 299, 121 S. Ct. 924.

When the Sixth Circuit held that the TSSAA was not a state actor, the MHSAA was adamant that it was very similar in structure to the TSSAA. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir.1999); (Supplementary Motion by Defendant MHSAA, 9/1/99, Dkt. No. 183; Renewed Motion by Individual Defendants, 9/1/99, Dkt. No. 182 ("the nature and function of the MHSAA is virtually *identical* to that of the TSSAA") (emphasis added).) This Court, however, felt that other decisions of the Supreme Court and other federal circuits necessitated the conclusion that the TSSAA was a

state actor. *Communities for Equity*, 80 F.Supp 2d at 738. Thus, there was still an open factual question for trial whether the MHSAA was a state actor, even though based on the facts presented at that time, this Court agreed with the MHSAA that it was nearly identical to the TSSAA. *Id.*; (Order, 8/31/01, Dkt. No. 452.)

The Supreme Court eventually reversed the Sixth Circuit, finding that the factual inquiry proved the TSSAA to be a state actor. *Brentwood Academy*, 531 U.S. at 298, 121 S. Ct. 924. Similarly, this Court finds that the facts presented at trial clearly necessitate a finding that the MHSAA is a state actor.

The purpose of the MHSAA—to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state—is virtually the same as its Tennessee counterpart. The MHSAA has a membership of predominantly public schools and almost every eligible public school belongs. Its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items, revenues to which schools would otherwise be entitled. The membership of the MHSAA's Representative Council includes a representative of the state superintendent of education and is comprised of mostly public school employees acting as representatives for their schools. Some MHSAA employees continue to be eligible for participation in the state employee retirement system. Moreover, the MHSAA exercises adjudicative power over the schools with its ability to investigate and determine rules violations and resultant sanctions.

Just as the Supreme Court recognized that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, that mechanism in the State of Michigan takes the form of public school officials acting together under the auspices of the MHSAA. This is clearly correct and strongly supported by the evidence presented in this case. For example, Ms. McGee, now a member of the Representative Council, said,

"[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14.) In addition, the MHSAA's own position paper on school choice notes that,

> Over the years, responsibility for regulating interscholastic athletics changed hands and organizations changed names, but always there have been provisions for statewide governance of interscholastic athletics. The MHSAA has been the serving and controlling organization for 67 years .... [T]he need for coordination of rules between districts [in non-athletic activities] has never risen to a level that a statewide regulatory body has been created to enforce a statewide code of rules and penalties [like in athletics].

(Tr. Exh. 22 at 3.) Finally, the MHSAA's developmental history is evidence of the fact that the State of Michigan felt that such a body was needed. Its legal status and official designation may have changed over the years, but as this Court has said before, the crucial question of its relationship with Michigan schools has not.

Being found to be a "state actor" is not a punishment, as Defendant suggests. (*See* Defendant's Proposed Findings of Fact and Conclusions of Law, 10/24/01, Dkt. No. 515 ("How long must the MHSAA pay for its historical relationship with the State that was ended through the legislative process in 1971?").) To the extent that it is a burden to ensure compliance with the Fourteenth Amendment to the United States Constitution, it is the honorable burden and duty of all entities and individuals acting with the power entrusted to them by their fellow citizens to ensure that they treat all American citizens fairly and with due regard for their rights. The role that the MHSAA has assumed, and particularly the power that it has been given to fulfill that role, leaves this Court with the firm conclusion that

"there is no substantial reason to claim unfairness in applying constitutional standards to it." *See Brentwood Academy*, 531 U.S. at 298, 121 S. Ct. 924.

B. Michigan Girls Have Been Denied Equal Protection By Current Seasons

To state a Fourteenth Amendment claim, Plaintiffs must also allege that Defendant treats high school boys differently from girls. *See United States v. Virginia*, 518 U.S. 515, 532-33, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Once Plaintiffs have established a gender classification, the burden of justifying the classification shifts to Defendant, and the justification must be "exceedingly persuasive." *Id.* Defendant

> must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 533, 116 S. Ct. 2264 (citations omitted). It is undisputed that Defendant intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year. Girls are treated differently from boys in two ways. First, some of the sports that girls are offered that are the same as offered to boys, e.g., basketball and golf, are played in a different season than the boys play. Second, volleyball, the only sport at issue with only a girls' team, is played in a season different from the "traditional" volleyball season, whereas no sport with only a boys' team, e.g., football or wrestling, is offered in a "non-traditional" season.

Thus, the remaining question for this Court to decide is whether Defendant meets its burden of establishing an "exceedingly persuasive" justification for treating girls and boys differently. In other words, this Court must determine if Defendant's classification of boys and girls via their sports teams' placement in the current seasons "serves important governmental objectives," and the chosen scheduling is "substantially related to the achievement of those objectives." *See id.* at 533, 116 S. Ct. 2264. The Supreme Court, while discussing the "exceedingly persuasive" standard for sufficient justification, noted that its current direction in cases of classification by gender focused on the differential treatment or denial of opportunity for which relief is sought. *Id.* at 532-33, 116 S. Ct. 2264.

Animus on the part of Defendant is not required for a finding of a Fourteenth Amendment violation where a rule or classification treats males differently from females on its face. Here, the classification of the MHSAA mandates that, for example, boys will play tennis in the spring, but girls will play tennis in the fall. That is a classification that on its face treats boys and girls differently. In another case involving a sex classification, *United States v. Virginia*, Virginia was found to have denied women equal educational opportunity on the basis of sex by refusing to allow any woman to attend Virginia Military Institute (VMI). *See* 518 U.S. at 530-534, 116 S. Ct. 2264 (citing other cases of facial classification by sex creating unlawful discrimination, like *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971) (holding unconstitutional an Idaho law requiring that when several persons are equally entitled to administer a decedent's estate, males must be preferred to females); *Stanton v. Stanton*, 421 U.S. 7, 95 S. Ct. 1373, 43 L.Ed.2d 688 (1975) (holding unconstitutional a Utah law that parents support male children until age 21, but support female children only until age 18)).

Virginia was not, however, found to have displayed animus toward women in excluding them from VMI. 518

U.S. at 532-34, 116 S. Ct. 2264. Such a finding must be made in cases of discrimination shown through disparate impact, where a rule or classification treats males and females the same by its terms, but the effect of the law is different on males and females. In those cases, intentional discrimination must be proven by showing that the body adopting the law or classification did so with the intent of discriminating against one sex or other protected group, i.e. some kind of animus. *Washington v. Davis*, 426 U.S. 229, 241-242, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) (where the District of Columbia required all police officer applicants to pass exam, and fewer black applicants passed than white applicants, test did not deny equal protection unless exam was used for invidious, discriminatory purposes instead of legitimate purposes). For example, where the Kentucky High School Athletic Association had a rule requiring that 25 percent of its member schools indicate a willingness to sanction a new sport before that sport would be sanctioned, female athletes claimed that the rule disproportionately served to deny them sports opportunities. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 269 (6th Cir.1994) (*Horner I*). Because the rule did not treat females differently from males in its requirements, the athletes had the burden of proving intentional discrimination by showing that the *facially neutral* "25 percent rule" was adopted for the purpose of denying them opportunities, and not for a legitimate purpose. *Id.* at 272.

It is common sense that it is not necessary to find animus, i.e., a discriminatory purpose, for a Fourteenth Amendment violation to be present in the case of a classification that on its face differentiates between males and females. If a class of persons is treated differently because of an immutable characteristic like sex, and that different treatment harms that class of persons for reasons not justified by an "exceedingly persuasive" justification, the affected class of persons is no more or less harmed by the unjustified discriminatory treatment merely because

Defendant does or does not have animus toward them. A Fourteenth Amendment violation can exist even if it was perpetrated by those who believe that they have honorable intentions.

Therefore, motive plays only a limited role in the case before this Court. If the scheduling of seasons harms female athletes, Plaintiffs need not prove that Defendant MHSAA scheduled male and female seasons differently with invidious intent to harm female athletes. But the MHSAA's "benign" justifications for different treatment are not to be accepted automatically, since tenable justifications must describe actual purposes of Defendant, not rationalizations for actions that were, in fact, differently grounded. *See Virginia*, 518 U.S. at 536-37, 116 S. Ct. 2264 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n. 16, 95 S. Ct. 1225, 43 L.Ed.2d 514 (1975)); *Califano v. Goldfarb*, 430 U.S. 199, 212-13, 97 S. Ct. 1021, 51 L.Ed.2d 270 (1977). *See also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727, 102 S. Ct. 3331, 73 L.Ed.2d 1090 (1982) (finding no resemblance between the "alleged objective" of excluding men from nursing school in order to engage in "educational affirmative action" benefitting women and the "actual purpose underlying the discriminatory classification," and thus rejecting the state's justification for the intentional discrimination on the face of the admissions rule) (*cited in Virginia*, 518 U.S. at 536, 116 S. Ct. 2264).

In addition, Defendant MHSAA cannot prevail by attempting to demonstrate that its intent was to help or protect girls by scheduling their sports when they have been if that "help" actually harms them or is based on paternalistic notions. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 684-85, 93 S. Ct. 1764, 36 L.Ed.2d 583 (1973) (finding that stereotyped distinctions between the sexes in law and official action at issue were made because of paternalistic notions where male military officers could automatically claim wives as dependents for extra benefits, but female

military officers had to prove that husbands were financially dependent to claim them as dependents).

As an initial matter, Defendant MHSAA is clearly responsible for the current placement of the sports seasons. Having the ability to set the beginning and closing dates of a season, to schedule the championship tournament, and to punish those who play the sport outside of the MHSAA-designated dates is obviously the ability to schedule a season. The fact that individual schools, conferences, and leagues decide competition dates within the parameters of the season is of no consequence. It is the parameters that determine what time of year a sport is played.

Defendant MHSAA must show that its classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives. The MHSAA's justification or justifications must be "exceedingly persuasive." The Court finds that the MHSAA has not met this burden.

The Court has concluded that none of the girls' sports at issue are scheduled in the advantageous season, for reasons fully explained in the Findings of Fact. The MHSAA's only other legitimate asserted objective for the separate scheduling, and in the case of volleyball, non-traditional scheduling, is to maximize athletic participation opportunities for both boys and girls. The MHSAA argues that its current scheduling system maximizes high school athletic participation opportunities by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team. The MHSAA also argues that the quality of the programs are maximized by the current scheduling, as well, as a result of the better officials and coaches being able to work over two separate seasons with both boys and girls, instead of splitting their time in one season between boys and girls or forcing schools to broaden the pool of officials and coaches,

opening up positions to people the MHSAA asserts would be less qualified individuals.

While these logistics-based objectives are "important," the Court concludes that the discriminatory scheduling is not "substantially related" to the achievement of those asserted objectives. The empirical evidence was wholly insufficient. The MHSAA chose to rely on anecdotal and weak circumstantial evidence instead, which is not enough. Even assuming that the MHSAA had sufficiently proven this point, that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems. Moreover, the logistics justification smacks of post hoc rationalization for a system that only in the relatively recent past decided that girls were entitled to play sports and be treated fairly in athletics. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate the Fourteenth Amendment of the United States Constitution by its current scheduling of seasons for the sports at issue.

II. PLAINTIFFS' TITLE IX CLAIM

A. Defendant MHSAA is Subject to Title IX by Virtue of Its Controlling Authority Over Interscholastic Athletics in Michigan

Section 901(a) of Title IX of the Education Amendments of 1972 provides, with exceptions not applicable here, that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a) (2001). For Plaintiffs to prevail on their Title IX claim, they must first establish that Defendant MHSAA is subject to Title IX.

This Court held earlier during the course of this litigation that "any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of

federal aid." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F.Supp 2d 729, 735 (W.D.Mich.2000). Based on the findings of fact, the Court must decide the extent to which Defendant MHSAA exerts control over interscholastic athletic programs of Michigan high schools, which are almost all federal funding recipients, to determine if Title IX applies to Defendant. *Id.* at 738. If Defendant exerts controlling authority over the scheduling of interscholastic sports seasons in Michigan, Defendant will be subject to Title IX's non-discrimination requirement in its scheduling of the seasons.

In *NCAA v. Smith*, the Supreme Court expressly declined to consider whether "controlling authority" is a basis on which an entity can be subject to Title IX. *NCAA v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924, 142 L.Ed.2d 929 (1999). The Sixth Circuit Court of Appeals also has not considered the "controlling authority" question. This Court extensively outlined its reasons for finding that Congress intended to apply Title IX to those entities exercising controlling authority over a federal program or programs, whether or not the entity itself is a recipient of federal funding, in its previously published opinion in this case on this topic. *See Communities for Equity*, 80 F.Supp 2d at 733-35. Defendant MHSAA urges the Court to reconsider this position on this issue, but the Court declines to do so.

Defendant cites to an opinion by another federal district court taking the opposite position of this Court and holding that entities not receiving federal funds may not be held liable under Title IX. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois*, 134 F.Supp 2d 965, 970 (N.D.Ill.2001).[52] This Court, in previously discussing this issue, noted that the Supreme Court has previously held

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[52] Presumably because most Federal Circuit Courts, as well as the Supreme Court, have not taken up the issue, the court in *Johnny's Icehouse* recognized that its decision faced the "undeniable potential for a contrary ruling," as this Court recognizes that its decision does. *See Johnny's Icehouse*, 134 F.Supp 2d at 971.

that Title IX has "two related, but nevertheless somewhat different objectives ... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Communities for Equity*, 80 F.Supp 2d at 733 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 704, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979)). This Court then found that:

> Not only is Defendants'[53] suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the *Cannon* decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Communities for Equity, 80 F.Supp 2d at 734. The federal district court in *Johnny's Icehouse* criticized the above reasoning of this Court with the argument that a funding recipient, like a school, may be liable if it fails to respond appropriately to discriminatory acts of non-agent third parties. *Johnny's Icehouse*, 134 F.Supp 2d at 970 (citations

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[53] At the time of that opinion, the MHSAA and a number of individuals were Defendants in this suit, but the individuals have since been dismissed.

omitted). Therefore, "controlling authority" liability under Title IX is not necessary to achieve the purposes of Title IX. Further, the *Johnny's Icehouse* Court reasoned that "controlling authority" liability is not authorized by Title IX.

This Court, however, respectfully disagrees with that reasoning. It is true that the Supreme Court has held funding recipients not liable for the discriminatory actions of their "agents" under Title IX, pursuant to a *respondeat superior* theory, where there is no evidence that a funding recipient knew or should have known about the discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283, 118 S. Ct. 1989, 141 L.Ed.2d 277 (1998) (*cited in Johnny's Icehouse*, 134 F.Supp 2d at 970). In Gebser, a case where a school was sued for its failure to prevent sexual harassment by a teacher against a student, the Supreme Court held that "a damages remedy will not lie under Title IX *unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf* has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290, 118 S. Ct. 1989 (emphasis added).

However, an entity with "controlling authority" over a recipient is not an agent of the recipient by the very nature of their relationship; instead, the recipient becomes like an agent and the controlling entity like a principal in the relationship. In situations like the one in this case, the nature of what needs to be accomplished by a group of recipients (here, controlling and regulating athletics) requires that the funding recipient-schools cede their own ability to control many aspects of their schools' athletic programs to the controlling entity-athletic association. Thus, after the recipient schools cede authority, if a recipient school believes that an athletic association is illegally discriminating, that one school alone has no authority or ability to stop the athletic association, unless it can convince a sufficient number of other schools and those

schools together would be able to change the association's action.

A school's only immediate recourse to stop its own "participation" in the discrimination is to discontinue offering an athletic program to its students, since the school cannot realistically offer a program without belonging to the association. In effect, one individual school cannot, in fact, be held liable for the association's Title IX violation because the recipient-school no longer has the "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *See Gebser*, 524 U.S. at 290, 118 S. Ct. 1989. It is true that "a funding recipient may be liable if it fails to respond appropriately to the discriminatory acts of nonagent third parties," *Johnny's Icehouse*, 134 F.Supp 2d at 971, but the law must fill the gap where the recipient has no effective way of responding appropriately because of its relationship with the third party. "Controlling authority" theory is needed to address this deficiency and effectuate the intent of Congress when it passed Title IX.

Moreover, contrary to Defendant MHSAA's other argument, "controlling authority" theory is consistent with what has been called the "contractual" character of Title IX. Title IX is legislation enacted under the Spending Clause, or in other words, is an exercise of Congressional power to fix the terms upon which federal funds will be disbursed. *Cf. Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 77 L.Ed.2d 866 (1983) (White, J.) (discussing Title VI); *see also Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605, 106 S. Ct. 2705, 91 L.Ed.2d 494 (1986) ("Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

Against this background, *Johnny's Icehouse* found that imposing Title IX obligations on "any ... entity not in contractual privity with the federal government or without the power to decide whether or not to accept federal financial assistance—would not fit into the Spending Clause foundation for the statute." *Johnny's Icehouse*, 134 F.Supp 2d at 970.[54] However, the Third Circuit case that *Johnny's Icehouse* cited for that proposition specifically did "not suggest that an absence of privity means that in no circumstances may a controlling authority argument be viable; we note that those who truly assume control of federally-funded programs are in a position to accept or reject that control as part of a decision whether or not to receive federal funds indirectly." *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir. 1999). The Third Circuit instead suggested that an absence of contractual privity between the entity sued and the federal funding source should give a court caution in imposing Title VI, or Title IX, obligations on the entity sued. *See id.*

This Court has heeded the persuasive warning of caution from the Third Circuit, and after consideration, believes that "controlling authority" theory is consistent with the contractual nature of liability under Title IX. Normally, contractual privity between the entity sued and the federal funding source should be required to hold the entity liable under Title IX, and this is the situation covered when indirect recipients of federal aid are subject to the requirements of Title VI, Title IX or § 504. *See Grove City*

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[54] *Johnny's Icehouse* cited to an opinion discussing Title VI, but courts have generally drawn analogies between Title IX, Title VI, and § 504 of the Rehabilitation Act of 1973 because of the similarities in these laws. *See NCAA v. Smith*, 525 U.S. 459, 467-69, 119 S. Ct. 924, 142 L.Ed.2d 929 (1999) (looking at case law interpreting § 504 of the Rehabilitation Act to interpret Title IX); *Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n. 4, 106 S. Ct. 2705, 91 L.Ed.2d 494 (1986) (Title VI case law can generally be relied on to interpret later statutes, like Title IX). This Court will draw the same analogies where case law concerns Title VI or § 504.

College v. Bell, 465 U.S. 555, 563-64, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984) (holding that college was subject to Title IX, even where students directly received the federal aid in loans and grants, but college was the indirect recipient of that aid).[55]

In another case, the Supreme Court held that airlines could not be subjected to a program-specific statute, § 504 there, because they were mere "beneficiaries" of federal funds, but not indirect recipients of airports' federal funding. *Paralyzed Veterans*, 477 U.S. at 607, 106 S. Ct. 2705 (citing *Grove City College v. Bell*, 465 U.S. 555, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984)). The Supreme Court there distinguished between colleges and airlines in these two cases by noting that an "intended recipient" of federal funds was liable under the program-specific statutes like Title IX, so colleges were liable because Congress meant to deliver money to them using college students as conduits, but airlines were not liable because Congress was not trying to aid them and they were mere beneficiaries of the funding. *See id.* at 606-07, 106 S. Ct. 2705.

In that vein, holding entities with "controlling authority" power over recipients liable under Title IX is consistent with the contract-like nature of Congress' power under the Spending Clause to set conditions for the use of federal money. A "controlling authority" over a funding recipient is more than a mere beneficiary of federal funds and is instead more like a recipient of the funds through its control of

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[55] *Grove City College* continues to be good law on the point for which this Court cites it. Part of *Grove City College* was subsequently superceded by Congressional action, however. The Supreme Court also held in *Grove City College* that Title IX was only intended to apply to the particular program or activity receiving the indirect assistance. *Grove City College*, 465 U.S. at 570-74, 104 S. Ct. 1211. Congress later enacted the Civil Rights Restoration Act of 1988 to clarify that the Supreme Court misinterpreted its intent in the coverage of Title IX and the other program-specific statutes, legislating instead that the coverage was broader than the specific program receiving assistance. *See* Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28 (1988).

important parts of the funding recipient's program. Congress grants federal money to states and school districts to help pay for educational programs generally, making non-discrimination conditions on the funds. When an educational program like interscholastic athletics requires a governing body like the MHSAA—a body having "controlling authority" over member schools in certain aspects of the educational program—the MHSAA accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.

The MHSAA is not an indirect recipient of federal funds, because it does not receive dues from the coffers of member schools, which has been the basis of Title IX liability for other state high school athletic associations. *See Horner*, 43 F.3d at 272 n. 5 (finding the Kentucky High School Athletic Association to be subject to Title IX as an indirect recipient of federal funds). But the MHSAA receives revenues to which member schools would otherwise be entitled, like tournament receipts, souvenir sales, and broadcast fees, and it operates tournaments largely using public facilities and public employees. Moreover, the MHSAA's legislative functions are conducted by mostly public school employees representing their schools. Finally, the MHSAA understands its function as controlling and regulating certain parts of member schools' athletic programs and has thus implicitly contracted with the federal government and had notice to obey the conditions under which member schools receive federal funding, funding which helps schools run athletic programs in the first place.

Defendant MHSAA clearly is the "controlling authority" over schools when it comes to scheduling of the sports seasons. Again, the MHSAA's power to declare beginning and closing dates of a season and dates of championship tournaments, as well as to punish those who play the sport outside of the MHSAA-designated dates, is the power to

schedule a season. No member school alone or even in concert with many other schools has the power to do this. A single school or consortium of schools, no matter how large, would still have to seek action within the MHSAA to change seasons. Therefore, Plaintiffs' evidence has firmly proved that Defendant MHSAA exerts "controlling authority" over the scheduling of interscholastic sports in the State of Michigan such that the MHSAA must comply with the mandate of Title IX.

B. Defendant MHSAA Has Violated Title IX With Its Current Seasons Scheduling

Plaintiffs must next establish that Defendant MHSAA's current scheduling of interscholastic sports seasons violates Title IX. The Court finds that Plaintiffs have established a Title IX violation. The United States Department of Education, as a federal department empowered to extend federal financial assistance to any education program or activity, has been directed to promulgate rules and regulations consistent with the objectives of Title IX. 20 U.S.C. § 1682 (2001).

As applied to interscholastic athletics, the Department of Education has promulgated the following regulation:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such activities separately on such basis.

34 C.F.R. § 106.41(a). To the extent that Plaintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would

otherwise enjoy if they were male, Plaintiffs have proved a Title IX violation.[56]

In addition, the federal agency originally charged with interpreting regulations and investigating alleged violations of Title IX has noted that elements of a program's structure like seasons of play can constitute a violation. Practices such as employing disadvantageous playing seasons for only one sex violate Title IX when the resulting harms are substantial enough to deny equal participation opportunities and benefits in athletics to students of one sex. *See* Department of Health, Education, and Welfare, Office for Civil Rights (OCR) Policy Interpretation, 44 Fed.Reg. 71413, 71416-71418 (1979). OCR also considers "[w]hether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity." *Id.* at 71418.

Finally, Defendant MHSAA continues to make the erroneous argument that it does with respect to Plaintiffs' Fourteenth Amendment claim that a claim under Title IX requires proof that the MHSAA had animus toward girls. It

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[56] Title IX claims in the area of athletics often fall into two categories corresponding to the regulations promulgated under Title IX: equal treatment claims, which this case presents, or effective accommodation claims. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 n. 1 (2d Cir.1999) (*cited in Pederson v. Louisiana State Univ.*, 213 F.3d 858, 865 n. 4 (5th Cir.2000)). Equal treatment claims derive from Title IX regulations calling for equal provision of athletic benefits and opportunities among the sexes. *Boucher*, 164 F.3d at 115 n. 2 (*cited in Pederson*, 213 F.3d at 865 n. 4).

The MHSAA agrees that Title IX assesses the athletic program of a liable party, but it also argues that Title IX does not assess the impact that "outside, business interests," like amateur athletic clubs and colleges and universities, have on these programs. That twists the issue. If discriminatory operation of the state's athletic programs through placement of seasons "denie[s] [girls] the benefits of, or ... subject[s] [girls] to discrimination" in interscholastic athletics such that girls' amateur and collegiate opportunities are limited in a way that boys' opportunities are not, Title IX is implicated.

does not. "Intentional discrimination" in the context of a Fourteenth Amendment violation means only that the MHSAA needs to have intended to treat girls differently from boys by intentionally scheduling them in different seasons than those in which boys play, which it clearly did, or by scheduling the girls-only sport of volleyball in a "non-traditional" season when boys-only sports are always played in "traditional" seasons, which it clearly did. As explained *supra*, that kind of "intentional discrimination" can be justified under certain circumstances, even though the Court has found that in this case it is not.

A Title IX violation similarly does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated. Different treatment can still result in equal opportunities for boys and girls, but it also may not, which is the reason for analyzing and comparing the benefits and the burdens of the differential treatment.

Language in a Fifth Circuit case is relied on by Defendant MHSAA who asserts that Title IX requires Plaintiffs to show that Defendant intended to harm girls in the scheduling of their seasons. *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir.2000). In that case, it was clear that Louisiana State University (LSU) was providing unequal athletic opportunities for its female students, for example, by only sponsoring new sports for women that administrators considered "more feminine" sports or by refusing to sponsor fast-pitch softball because "the women might get hurt." *Pederson*, 213 F.3d at 881. The federal district court there found that LSU was violating Title IX, but for the purposes of deciding whether monetary relief was due to Plaintiffs in addition to injunctive relief, the district court determined that the

discrimination was unintentional and thus Plaintiffs could not obtain monetary relief. *Pederson*, 912 F.Supp. 892, 917 (M.D. La. 1996). The district court still ordered injunctive relief, however, on the basis of the Title IX violation. *Id.* at 921. That is the only kind of relief requested in this lawsuit.

After reviewing the facts, the Fifth Circuit reversed the district court's finding that the LSU discrimination was unintentional, held that LSU was intentionally discriminating between women and men, and held that the district court erroneously dismissed the monetary damages claims. *Pederson*, 213 F.3d at 884. But in determining whether an "effective accommodation" violation of Title IX was present, which is unlike the "equal treatment" violation alleged here, the Fifth Circuit affirmed the district court's finding that LSU was not effectively accommodating the sports interests of its female students. *Id.* at 879.

Pederson held that regulations promulgated under Title IX guide a court's analysis as to whether a violation has occurred. *Pederson*, 213 F.3d at 879. This is the analysis that this Court has articulated: in an "equal treatment" violation under Title IX, the question is whether female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would otherwise enjoy if they were male.

In the Findings of Fact, the Court found that all of the girls' sports at issue where a counterpart boys' team exists are subject to disadvantages to which they would not otherwise be subject if they played in the seasons that the boys do. Moreover, the Court found that girls who play volleyball in the non-traditional season in which it is now scheduled suffer disadvantages that they would not otherwise suffer if they were male and participated in a boys-only sport that was scheduled in its traditional season. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate Title IX by scheduling seasons of the sports at issue in the manner in which it has.

III. PLAINTIFFS' ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIM

There are two provisions of the Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, *et seq.*, Michigan's civil rights statute, at issue in this litigation. One applies to the acts of "educational institutions." The other applies to discrimination in the provision of public accommodation and/or public services. Under the ELCRA provision prohibiting discrimination in Michigan in the provision of a public service or public accommodation, this Court finds that Defendant MHSAA violated Plaintiffs' rights under the ELCRA.

A. Mich. Comp. Laws § 37.2402

First, "educational institutions" are prohibited from discriminating against individuals in their benefit from the institution, or services, activities, or programs provided by the institution, on the basis of an individual's sex. Mich. Comp. Laws § 37.2402 (2001). The definition of "educational institutions" includes "an agent of an educational institution." Mich. Comp. Laws § 37.2401 (2001). Therefore, if Defendant qualifies as an agent of the schools that comprise its membership, Defendant is subject to the ELCRA under this provision of the ELCRA.

"Agent" is not defined in the ELCRA. This Court's research turned up no Michigan cases, nor any federal cases interpreting Michigan law, defining what an "agent" of an "educational institution" is for purposes of the ELCRA. Under Michigan law generally, in determining "[w]hether an agency has been created," a court is to consider "the relations of the parties as they in fact exist under their agreements or acts." *St. Clair Intermed. Sch. Dist. v. Intermediate Educ. Ass'n/Michigan Educ. Ass'n*, 458 Mich. 540, 557, 581 N.W.2d 707 (1998) (quoting *Saums v. Parfet*, 270 Mich. 165, 170-171, 258 N.W. 235 (1935)). The Michigan Supreme Court has noted that in its broadest sense agency "includes every relation in which one person acts for or

represents another by his authority." *Id.* An agent is a business representative whose function it is to bring about, modify, affect, accept performance of, or terminate contractual obligations between the agent's principal and third persons. *Id.* at 557-58, 581 N.W.2d 707. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to the agent. *Id.* at 558, 581 N.W.2d 707 (citations omitted).

The Court finds that the MHSAA cannot be liable to ELCRA claims under this section because it cannot be considered its member schools' agent. The Michigan Supreme Court has said that it is "fundamental" to finding that one party in a relationship is an agent that the principal be able to control the conduct of the agent with respect to the matters entrusted to the agent. One member school alone cannot control the actions of the MHSAA, so the MHSAA is not the "agent" of any one member school.

Moreover, the member schools together cannot be considered a "principal" because they cannot together be one "educational institution" under the statute, as they in fact constitute many educational institutions. Additionally, the member schools have come together in the form of the MHSAA largely to make contracts among themselves, regarding eligibility rules, etc., which is an associational relationship, but not an agency.

B. Mich. Comp. Laws § 37.2302

The ELCRA also covers those entities providing public accommodation or public services. "Except where permitted by law, a person shall not: (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public services because of ... sex ...." Mich. Comp. Laws § 37.2302 (2001).

A "person" is defined as "an individual, agent, association, corporation, ... unincorporated association, the state or a political subdivision of the state, or any agency of

the state, or any other legal or commercial entity." Mich. Comp. Laws § 37.2103(g) (2001). Surely, Defendant MHSAA is a "person" for these purposes since it has incorporated itself with the State of Michigan. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) It could also aptly be described as an "association" given its structure, and while it is not dispositive, the fact that the word "association" also appears in its name lends support to this conclusion.

In addition, this Court finds that the MHSAA provides both a "public service" and a "public accommodation." A "public service" includes "a tax exempt private agency established to provide a service to the public." Mich. Comp. Laws § 37.2301(b) (2001). Lions clubs were held liable under this section of the ELCRA and found to be both providing a "public service" and constituting a "public accommodation." *Rogers v. International Ass'n of Lions Clubs*, 636 F.Supp. 1476, 1479 (E.D. Mich. 1986). The Court held that Lions clubs provided a "public service" because the volunteer efforts by its members were made available to the public. *Id.* The Court also found it important that the Lions were tax exempt. *Id.* To some degree that the Court could not fully determine, the MHSAA is also tax exempt. (*See* Tr. Exh. 36 (copies of MHSAA tax returns)). It certainly was established to provide a service to the public, the organization of interscholastic athletics in the state's schools, and it is still in existence for that purpose. Thus, the MHSAA qualifies as a "public service."[57]

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[57] Moreover, a "public service" also encompasses "a public facility, department, agency, board, or commission owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof ...." Mich. Comp. Laws § 37.2301(b) (2001). It is likely that the MHSAA could also qualify under this definition as well, since the political subdivisions for whom it acts as an agency or commission to control interscholastic athletics are local school boards and schools. These local school boards would otherwise have responsibility for organizing interscholastic athletics or would have to find another vehicle beside the MHSAA to do so. *See* Findings of Fact on Defendant MHSAA.

The MHSAA qualifies as providing a "public accommodation" as well. An event open to the public held in a public place is a place of "public accommodation." *Rogers*, 636 F.Supp. at 1479. For one, the MHSAA sponsors championship tournament events, held in public places and open to members of the general public. Additionally, the MHSAA facilitates the scheduling of interscholastic athletics generally with its activities, and athletic programs hold competitions in public places that are open to the general public on a regular basis. Similarly, the Michigan Supreme Court found that a township's athletic program offered to elementary school children is a "public accommodation" or "public service" under the ELCRA. *Cf. Department of Civil Rights ex rel. Forton v. Waterford Twp. Dep't of Parks and Rec.*, 425 Mich. 173, 202, 387 N.W.2d 821 (1986) (*Forton*) (apparently assuming that the program at issue qualified under Mich. Comp. Laws § 37.2302 and remanding for retrial and for application of the constitutional standard enunciated in the opinion).

The Michigan Supreme Court determined that the goal of the Michigan Legislature in adopting this provision of the ELCRA was to broaden the scope of those parties to whom civil rights legislation would apply in the State of Michigan, in contrast to comparable federal provisions. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. Most notably, the ELCRA covers non-governmental conduct in the handling of public accommodations and services that federal provisions do not. *Id.* at 186, 387 N.W.2d 821.

C. Standard to Find Discrimination Under Mich. Comp. Laws § 37.2302

But the Michigan Supreme Court held that the goal of ELCRA was not to broaden the standard of equal protection, i.e., not to require stricter scrutiny of laws that classify on the basis of protected characteristics than federal law would, but instead to provide the same level of scrutiny of discriminatory classifications. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. *Forton*, which also involved a claim

strikingly similar to this case, involved a challenge to a township's practice of assigning different seasonal schedules to township league teams for elementary school students on the basis of sex in its township athletic program. *Forton*, 425 Mich. at 190, 387 N.W.2d 821. The Michigan Supreme Court held that the applicable standard to determine whether unlawful discrimination has occurred because of a discriminatory classification is the same standard used under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Forton*, 425 Mich. at 190, 387 N.W.2d 821 (applying to "public accommodation" claims). *See also Alspaugh v. Comm'n on Law Enforcement Standards*, 246 Mich. App. 547, 555-56, 634 N.W.2d 161 (2001) (using intermediate scrutiny in ELCRA challenge by males to state police's different passing standards for males and females); *Garrett v. Board of Educ. of Sch. Dist. of City of Detroit*, 775 F.Supp. 1004, 1010 (E.D. Mich. 1991) (citing *Forton*, 425 Mich. at 190, 387 N.W.2d 821).[58]

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[58] *Garrett* involved a challenge by girls and their parents to the establishment of all-male public school academies in Detroit. *Garrett*, 775 F.Supp. at 1005. Like the instant case, *Garrett* presented an intentional discrimination claim because the school system had a rule that on its face differentiated between males and females, i.e., female children were not permitted to attend an all-male, public academy. *See id.* at 1006 (proceeding to consider whether the claim serves "important governmental objectives" and that the discriminatory classification involved was "substantially related to the achievement of those objectives" because of the rule treating girls and boys differently in admission).

Another federal court in Michigan has stated that plaintiffs bringing an ELCRA claim under *either* an intentional discrimination or disparate impact theory must produce facts from which the finder of fact could reasonably infer unlawful motivation. *Sanders v. Southwest Airlines Co.*, 86 F.Supp 2d 739, 744 (E.D. Mich. 2000). This Court respectfully finds that to be an erroneous interpretation of Michigan law.

The Michigan Supreme Court is the highest authority on the meaning of Michigan law. As explained in this opinion, the Michigan Supreme Court has held that ELCRA claims are evaluated under the same

standards as federal Equal Protection claims are. *Forton*, 425 Mich. at 190, 387 N.W. 2d 821. Under federal law, an intentional discrimination claim does not require proof of discriminatory motivation because the challenged law or rule has already discriminated against a protected class on its face. *Cf. Virginia*, 518 U.S. at 532-34, 116 S. Ct. 2264 (compare *Washington v. Davis*, 426 U.S. at 241-242, 96 S. Ct. 2040). *Forton*, as an intentional discrimination case, employed the intermediate scrutiny standard for sex-based classifications that the U.S. Supreme Court still employs.

Sanders cites cases from the Michigan Court of Appeals for its proposition requiring discriminatory motivation in cases presenting a facial classification. *See Reisman v. Regents of Wayne State Univ.*, 188 Mich. App. 526, 538, 470 N.W. 2d 678 (1991); *Meagher v. Wayne State Univ.*, 222 Mich. App. 700, 708-09, 565 N.W. 2d 401 (1997); *Fonseca v. Michigan State Univ.*, 214 Mich. App. 28, 31, 542 N.W. 2d 273 (1995) (*cited in Sanders*, 86 F.Supp. 2d at 744). But cases to which *Sanders* cites are all disparate impact cases, so those type of cases *do* require proof of discriminatory motivation in addition to proof that a member or members of a protected class have been disparately impacted by a law, rule or decision otherwise neutral on its face. In turn, these Michigan Court of Appeals cases all cite to other disparate impact cases, all employment discrimination cases with the exception of *Fonseca*, containing a summary statement with the proposition that both intentional discrimination and disparate impact claims require proof of discriminatory motivation behind the decision, but none of them cite *Forton*. After *Forton*, that proposition was implicitly rejected by the Michigan Supreme Court. *Cf. Forton*, 425 Mich. at 190, 387 N.W. 2d 821.

For citation history of Reisman, see Singal v. General Motors Corp., 179 Mich. App. 497, 502-03, 447 N.W. 2d 152 (1989) (*cited in Reisman*, 188 Mich. App. at 538, 470 N.W. 2d 678); *Dixon v. WW Grainger, Inc.*, 168 Mich. App. 107, 114, 423 N.W. 2d 580 (1987) (*cited in Singal*, 179 Mich. App. at 503, 447 N.W. 2d 152); *Jenkins v. Southeastern Michigan Chapter, Amer. Red Cross*, 141 Mich. App. 785, 793-94, 369 N.W. 2d 223 (1985) (*cited in Dixon*, 168 Mich. App. at 114, 423 N.W. 2d 580); *Michigan Civil Rights Comm'n ex rel. Boyd v. Chrysler Corp.*, 80 Mich. App. 368, 373 n. 3, 263 N.W. 2d 376 (1977) (*cited in Jenkins*, 141 Mich. App. at 794, 369 N.W. 2d 223) (discussing the pleading requirements for a disparate treatment, employment discrimination case).

For citation history of Meagher, see Reisman, 188 Mich. App. at 538-39, 470 N.W. 2d 678 (*cited in Meagher*, 222 Mich. App. 708-09, 565 N.W. 2d 401); *Lytle v. Malady*, 209 Mich. App. 179, 185 n. 1, 530 N.W. 2d 135 (finding, without citation, that intentional discrimination and disparate impact are the same theory) (*cited in Meagher*, 222 Mich. App. at 709, 565 N.W. 2d 401) (*Lytle* rev'd on other grounds, 456 Mich. 1, 566 N.W. 2d 582

Thus, the standard for decision under Plaintiffs' ELCRA claim is the same as under their Fourteenth Amendment claim. As stated in the above discussion of why Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment have been violated, the Court similarly finds that Defendant MHSAA has violated the ELCRA.

CONCLUSION

"Parents, athletes and spectators should insist on equality for women's athletics. It's nothing less than the law, and nothing less than women athletes deserve." -Editorial, *You Go, Girls*, St. Louis Post-Dispatch, July 13, 1999, at B16.

Unfortunately, the insistence required in this case took the form of legal action. The history of girls' sports lends a belief that girls' seasons were originally put in the seasons

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(1997)) (partially vacated on other grounds, 458 Mich. 153, 579 N.W. 2d 906 (1998)); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 654, 378 N.W. 2d 558 (1985) (*cited in Meagher*, 222 Mich. App. at 709, 565 N.W. 2d 401); *Boyd*, 80 Mich. App. at 373 n. 3, 263 N.W. 2d 376 (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W.2d 558; *Schipani*, 102 Mich. App. at 617, 302 N.W. 2d 307); *Jenkins*, 141 Mich. App. 785, 369 N.W. 2d 223 (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W. 2d 558); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 617, 302 N.W. 2d 307 (1981) (*cited in Brewster*, 145 Mich. App. at 654, 378 N.W. 2d 558) (*Schipani* recognized by *Kostello v. Rockwell Intern. Corp.*, 189 Mich. App. 241, 245, 472 N.W. 2d 71 (1991) as routinely rejected by other panels on other grounds).

Fonseca was a claim by a student not accepted to an MSU graduate program that her rejection was for discriminatory reasons, similar to employment discrimination cases where an individual is fired or denied promotion for allegedly discriminatory reasons. *Fonseca*, 214 Mich. App. at 29, 542 N.W. 2d 273. In *Fonseca*, the Court of Appeals made no statements with respect to claims proven through intentional discrimination shown through a rule or classification discriminatory on its face, but only concerned decisions allegedly made for discriminatory reasons, which must be proved to state a disparate impact claim. *See id.* at 31, 542 N.W. 2d 273.

that they were for impermissible reasons, and they simply have not been moved because of inertia or out of concern for the inconveniences that boys' programs would face. Continued administrative convenience of being able to find facilities, coaches or officials more easily if girls and boys are in separate seasons also does not justify such a system where the separate seasons are not equal for girls. If lack of resources is indeed a reality that requires single-sex seasons in some sports, which was not proved to the Court's satisfaction, then that is a reality that boys must also share.

The MHSAA has provided examples to this Court where it has been pro-active in promoting gender equity in sports. While the Court applauds the MHSAA on these efforts, the fact that the MHSAA may have been or continues to be pro-active in promoting gender equity in some areas of interscholastic sports in Michigan is not relevant to the fact that the MHSAA has acted contrary to law requiring gender equity in the particular situation before this Court. Frankly, conducting an unbiased examination of the facts and listening to dissenters, instead of merely surveying, would have told the MHSAA a long time ago what this Court is now telling it.

The Court will declare that the MHSAA's current scheduling of high school girls' sports in Michigan violates the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act. The Court will enjoin Defendant MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. As a result, the Court will retain jurisdiction over this case to order that an appropriate remedy be adopted in a Compliance Plan to be submitted by Defendant MHSAA.

The Court will order that Defendant MHSAA bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year. Defendant MHSAA will be ordered to submit a Compliance Plan consistent with this Opinion by June 24, 2002, detailing

a new schedule for sports seasons that complies with the law.

The parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, this Court will approve the Compliance Plan. For example, Defendant MHSAA is not required to combine seasons of girls' teams and boys' teams in any particular sport, but any remaining single-sex seasons must as a group advantage and disadvantage girls and boys equally. In addition, nothing prevents Defendant MHSAA from utilizing various other scheduling mechanisms designed to treat males and females alike, such as putting freshman and/or junior varsity teams of both sexes into the disadvantageous season while putting varsity teams of both sexes into the advantageous season.

After Defendant MHSAA submits its Compliance Plan proposing how it will reschedule interscholastic sports seasons to comply with applicable law, Plaintiffs and the United States will be given the opportunity to respond to the MHSAA's proposed Compliance Plan. Plaintiffs and the United States will be ordered to respond to Defendant MHSAA's Compliance Plan by July 15, 2002 or within fourteen days of service of the plan on Plaintiffs and the United States, whichever is earlier.

At that time, the Court will decide whether the Compliance Plan of new seasons scheduling complies with the applicable law and is an appropriate remedy. The Court will also order briefing from the parties on the issue of whether Plaintiffs are entitled, under 42 U.S.C. § 1988, to payment of their attorneys' fees by Defendant MHSAA and the appropriate amount. Finally, the Court will approve the partial settlement reached by Plaintiffs and Defendant MHSAA on other issues originally part of this litigation and will enter the Consent Decree at the same time as this Opinion.

No. 02-1127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY,
Plaintiff-Appellee,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant-Appellant.

[FILED]
[DEC 07, 2006]
[LEONARD GREEN, CLERK]

ORDER

BEFORE: KENNEDY, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

U.S. Constitution Amendment XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

20 USCS § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition. in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions. in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets. this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine. this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy. in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations. this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [26 USCS § 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences. this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions. this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants. this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

* * *

ELLIOTT-LARSEN CIVIL RIGHTS ACT

M.C.L. 37.2101 *et seq.*

* * *

37.2101 Short title.

Sec. 101. This act shall be known and may be cited as the "Elliott-Larsen civil rights act".

* * *

37.2103 Definitions.

Sec. 103. As used in this act:

(a) "Age" means chronological age except as otherwise provided by law.

(b) "Commission" means the civil rights commission established by section 29 of article V of the state constitution of 1963.

(c) "Commissioner" means a member of the commission.

(d) "Department" means the department of civil rights or its employees.

(e) "Familial status" means 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person. For purposes of this definition, "parent" includes a person who is pregnant.

(f) "National origin" includes the national origin of an ancestor.

(g) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a

political subdivision of the state or an agency of the state, or any other legal or commercial entity.

(h) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state.

(i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

(*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations, or public services, education, or housing.

(*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.

(*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

* * *

37.2301 Definitions.

Section 301. As used in this article:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the

public. Place of public accommodation also includes the facilities of the following private clubs:

(*i*) A country club or golf club.

(*ii*) A boating or yachting club.

(*iii*) A sports or athletic club.

(*iv*) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.

(b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

37.2302 Public accommodations or services; prohibited practices.

Sec. 302. Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

(b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public

service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

37.2302a Applicability to private club.

Sec. 302a.

(1) This section applies to a private club that is defined as a place of public accommodation pursuant to section 301(a).

(2) If a private club allows use of its facilities by 1 or more adults per membership, the use must be equally available to all adults entitled to use the facilities under the membership. All classes of membership shall be available without regard to race, color, gender, religion, marital status, or national origin. Memberships that permit use during restricted times may be allowed only if the restricted times apply to all adults using that membership.

(3) A private club that has food or beverage facilities or services shall allow equal access to those facilities and services for all adults in all membership categories at all times. This subsection shall not require service or access to facilities to persons that would violate any law or ordinance regarding sale, consumption, or regulation of alcoholic beverages.

(4) This section does not prohibit a private club from sponsoring or permitting sports schools or leagues for children less than 18 years of age that are limited by age or to members of 1 sex, if comparable and equally convenient access to the club's facilities is made available to both sexes and if these activities are not used as a subterfuge to evade the purposes of this article.

37.2303 Exemptions.

Sec 303. This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of the Extra Session of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws. This section shall not apply to a private club that is otherwise defined as a place of public accommodation in this article.

* * *